United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF AND APPENDIX FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

JANUARY TERM, 1942.

No. 8150

GILBERT S. SEEK, *Appellant,*

v.

THOMAS B. HARRIS, ET AL., *Appellees.*

Appeal from the District Court of the United States for the District of Columbia.

ARTHUR J. HILLAND,
DE WITT STETTEN,
Attorneys for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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FOR THE DISTRICT OF COLUMBIA

JANUARY TERM, 1942.

No. 8150

GILBERT S. SEEK, *Appellant,*

v.

THOMAS B. HARRIS, ET AL., *Appellees.*

BRIEF ON BEHALF OF APPELLANT.

JURISDICTIONAL STATEMENT.

A complaint alleging damages in the amount of $3,000 for alleged misrepresentation in the sale of real property was filed by the appellees in the District Court of the United States for the District of Columbia. (App. 2-5) That Court had jurisdiction by virtue of Title 18, Section 44 of the District of Columbia Code of 1929. Appellant's motions for a directed verdict at the close of plaintiff's evidence and all the evidence were overruled. The Jury returned a verdict for the plaintiff in the amount of $400.00. A judgment was entered upon the verdict and appellant's

motion to set aside the verdict and judgment and to have judgment entered in accordance with his motion for a directed verdict was overruled. This court has jurisdiction by virtue of Title 18, Section 26 of the District of Columbia Code of 1929.

STATEMENT OF CASE.

This appeal is from a judgment awarding the appellees $400.00 damages for alleged misrepresentations by the appellant's agent in the sale of a house and lot in the District of Columbia. (App. 7)

PLEADINGS.

In their complaint (App. 2-5) the appellees allege that in the summer of 1938 the appellant offered for sale through the real estate brokerage firm of Waple and James, Incorporated a house and lot at 6507 Piney Branch Road, N. W. They allege that the appellant by and through his agent held out and falsely represented to them that the lot included all the area within certain fences previously erected by the defendant, although all of the area within said fence did not in fact belong to said appellant, and further allege that the appellant knowing the appellees had been misled as to the boundary induced the appellees to execute a contract for the purchase of the house and lot and that they did purchase the house and lot and that shortly after they purchased the property the District of Columbia paved the public alley which bounded the south line of the lot and in the process removed the fence erected by the appellant, which they alleged extended along the south side of the lot for a distance of about 119 feet, and also removed a tree from the lot and marred the lawn, and that the fence and tree were on public property although the defendant by and through his agent had represented that they were on the lot.

The appellant filed a motion to dismiss the complaint on the grounds:

"1. The complaint fails to state a claim against defendant upon which relief can be granted.

2. The quantity of land in lot 62 and part of lot 63 was a matter equally within the knowledge of the plaintiffs and the defendant.

3. The complaint shows on its face that the subject matter of the sale was lot 62 and part of lot 63 in square 2973, the size of which was a matter of public record, and the plaintiffs were not justified in relying on any representations of the defendant's agent with respect to the boundaries of said lots, the said boundaries being ascertainable either from the public records or by survey.

4. There is no allegation that the defendant's agent did anything to prevent the plaintiffs from ascertaining the correct boundaries of the lots in question.

5. The doctrine of caveat emptor applies.

6. Other reasons appearing on record." (App. 5)

This motion was overruled. (App. 6)

The appellant, in his answer, alleged that the complaint failed to state facts entitling appellees to the relief claimed and denied that any misrepresentations constituting actionable fraud were made. (App. 6)

EVIDENCE.

The evidence showed that the appellant is a builder, having been engaged in the business of building and selling homes in the District of Columbia for over 25 years (App. 31.) and that the salesman for Waple and James, Incorporated, Mr. Partlow, has been engaged in the business of selling real estate in this City since 1924. (App. 35)

The lot in question was bounded on the south by a public alley which was not paved at the time of the sale. (App. 12) The southeast corner of the house came right up to the lot line at the alley. (App. 32) and Tr. 153) The appellant built a fence along the lot line bounded by the alley; the

alley along the line where the fence was erected is perfectly straight. (App. 39) The west end of the fence was attached to the southeast corner of the house by a two by four post and extended in an easterly direction to the end of the alley, a distance of about 129 feet, except for a break of about 25½ feet to provide for an entrance to a garage in the rear of the house. That section of the fence running from the corner of the house to the break provided for the garage entrance was about 35 feet 8 inches and was the section uprooted by the District of Columbia when the alley was paved. (App. 23) The other section of the fence which extended from the opposite side of the garage entrance to the end of the alley, a distance of about 66½ feet, of which 13 feet 9 inches bounded on the lot in question, was not disturbed when the alley was paved. (App. 39) There was a telephone pole in the alley near the garage end of the section of the fence running from the house to the garage entrance. The pole was about one foot from the lot line. The fence was erected inside this telephone pole. (App. 41)

The tree in question was located opposite the southeast corner of the lot, in front of the house, and about 2 to 4 feet from the lot line in the public alley. (App. 23, 24) Sod was laid around and beyond the tree. (App. 12) At the time the appellees first inspected the house and lot, the street (Piney Branch Road) was paved with concrete, granite curbing lined the street, a concrete sidewalk had been laid and the entrance to the alley was clearly and definitely shown by the break and bend in the curbing and the concrete was graded down from the sidewalk to permit entrance into the alley; and there was also a copper surveyor's peg in the sidewalk marking the lot line and the beginning of the alley. (App. 25, 33) The community in which the house and lot were located was not a new subdivision but a well developed community which has been established for years.

There does not appear to be much dispute about what the salesman for Waple and James told the appellees about the tree on the front of the lot. On the occasion when the

appellees first inquired of the salesman, Mr. Partlow, about the tree they were standing in front of the house. (App. 12) The appellee, Thomas B. Harris, testified, that on that occasion the salesman said "the tree is inside on your property; you get the shade tree" (App. 12); but Harris also testified, "I think he thought it belonged there. He was mistaken the same as I was" (App. 13) and again, after he had testified that he talked with Mr. Partlow in 1940 about refinancing the first trust he was asked: "Q. At that time did you accuse Mr. Partlow of defrauding you" and he answered, "No, I think he was an innocent man. He was deceived the same as I was." (App. 18) The appellee, Mrs. Pearle D. Harris testified with respect to the same occasion when they were in front of the house, that Partlow said, "Yes, you get the shade tree. As far as I know, the tree belongs to you. Evidently it was left on the lot and terraced all around, so it must belong on the lot." (App. 19) The salesman, Mr. Partlow, testified with respect to the tree, that when Mrs. Harris asked "will it go with it," he replied, "As far as I know Mrs. Harris." (App. 37)

There is no testimony that either appellant or his agent made any statement with respect to the fence in the rear of the property. The other acts which the appellees apparently contend are actionable fraud consist of the alleged act of placing the fence about one foot beyond the lot line into a public alley for a distance of about 30′ in the rear of the lot and the act of extending the sod on the front of the lot around and beyond the tree in question.

The evidence showed that the appellees employed and paid the firm of Waple & James to prepare the deed and obtain a continuation of title for them; that they read the deed and the continuation of title and that both the deed and the continuation of title described the lot by metes and bounds as well as by reference to a plat in the surveyor's office and lot and square numbers. (App. 13-14)

The appellant admitted that the tree was not on the lot and testified that it was probably further from the lot line and into the alley than the appellees had testified and that

he thought it was apparent to the naked eye that it was not on the lot. (App. 34) The appellant further testified that he instructed his workman to erect the fence inside the surveyor's pegs marking the lot lines and that it was still in the same place as when he erected it. (App. 34) The appellant's workman, Joseph William Simpson, testified that he placed the fence well inside the surveyor's pegs. (App. 42)

The appellant's motion for a directed verdict at the close of the plaintiff's evidence and at the close of all the evidence, and his motion to set aside the verdict and judgment and to have judgment entered in accordance with his motion for a directed verdict were denied. (App. 6, 9 and 31)

STATEMENT OF POINTS.

1. The Court erred in overruling appellant's motion to dismiss the complaint. Under the law as established in this jurisdiction by the case of *Shappirio* v. *Goldberg,* 20 App. D. C. 185, 192 U. S. 232, the complaint failed to state a claim upon which relief could be granted. The appellees had opportunity to make any investigation they desired and they did, in fact, have an investigation made of the title and dimensions of the lot in question and they cannot afterwards allege that the act of laying the sod and erecting the fence beyond the lot line constitutes actionable fraud.

2. The court erred in overruling Appellant's motion for a directed verdict at the close of the appellee's evidence and all the evidence. The evidence showed that the appellees made their own investigation of the condition, location, and size of the property and cannot afterwards say they were deceived by the defendant. The evidence failed to show any misrepresentations on the part of the appellant or his agent in regard to a material fact upon which the appellees were entitled to rely and upon which they did rely. The statements of the agent by which the appellees contend they were mislead were mere expressions of opinion.

3. The court erred in overruling the appellant's motion to set aside the verdict and judgment and to have judgment entered in accordance with his motion for a directed verdict. The complaint and all the evidence fails to show any design either by word or act on the part of the appellant or his agent to deceive or mislead the appellees.

SUMMARY OF ARGUMENT.

This case is clearly governed by the case of *Shappirio* v. *Goldberg*, 20 App. D. C. 185, 192 U. S. 232. The facts in the two cases are nearly parallel and there was definite evidence of design to defraud in the *Shappirio* case which does not appear in the case at bar. The law as established by the *Shappirio* case is that where the vendor gave the vendee every opportunity he possessed to inform himself of the location, the condition, and the title to the lands under negotiation, and the vendee did make his own investigation and had the title searched and deed prepared by his own agent and the property is accurately described in the contract, deed and continuation of title he cannot afterwards complain that he has been deceived about the condition, size or location of the property purchased. The appellees in this case made their own investigation and inspection of the property, they employed and paid the firm of Waple & James, Inc., to prepare the deed and obtain a continuation of title, both of which accurately described the property by metes and bounds, by lot and square number and by reference to a plat in the surveyor's office. They cannot afterwards complain that they have been deceived about the size, condition and location of the lot.

The evidence does not show any misrepresentations either by word or act which constitute actionable fraud. The expressions by which the appellees allege they were misled and defrauded were mere expressions of opinion based on the same physical surroundings equally apparent to the appellees. The evidence did not show that either the appellant or his agent made any positive statements of fact

upon which the appellees relied or upon which they were entitled to rely.

The whole case completely fails to show any design to defraud either by word or act. No intent to deceive or defraud is even imputed to the agent; he is expressly absolved from any intent to defraud by the appellees' testimony. There is nothing in the evidence to show any intention on the part of the appellant to defraud or any word or act of the appellant which constitute actionable fraud.

ARGUMENT.

1. The appellees had opportunity to make any investigation they desired to make and they did, in fact, have an investigation made of the title and dimensions of the lot in question and they cannot afterwards allege that the fact of laying the sod and erecting the fence beyond the lot line constitutes actionable fraud.

This case is clearly governed by the law in *Shappirio* v. *Goldberg*, 20 App. D. C. 185, 192 U. S. 232. It is hard to imagine two cases in which the facts are more nearly parallel than the case at bar and the *Shappirio* case. Shappirio, the plaintiff, was the purchaser and Goldberg, the defendant, the vendor of the property. Shappirio sued in equity to rescind the sale and for the return of the purchase price. The lower court directed a verdict for the defendant. This court and the United States Supreme Court affirmed the decision. A brief summary of the facts in the *Shappirio* case as outlined by this court and the Supreme Court as they compare with the facts in the present case will be helpful.

Shappirio Case.	This Case.
1. Goldberg's salesman told Shappirio that the dimensions of the property were 34 feet wide and a uniform depth of 80 feet.	1. The salesman told the appellees "the tree is inside on your property, you get the shade tree", or, "Yes, you get the shade tree. As far as I know, the tree belongs to you. Evidently it was left on the lot and terraced all around, so it must belong on the lot", or, "As far as I know Mrs. Harris." No representations were made with respect to the fence.
2. The property was not, in fact, uniformly 80 feet deep. There was a shed that appeared to be on the rear portion of the lot that was not included in the property conveyed. The rear end of the lot was L shaped.	2. The tree and the fence were not, in fact, on the property.
3. The appearance of the property was such that it might well mislead a prospective purchaser on mere cursory inspection.	3. The appearance of the property was such that it might mislead a prospective purchaser on mere cursory inspection, except that there was a surveyor's peg in the sidewalk and the entrance to the alley was so clearly marked that an ordinarily prudent person should have been able to determine that the tree was in the alley.
4. Shappirio employed and paid Goldberg's salesman to draw the deed and investigate the title. The deed and the sales contract accurately described the property by metes and bounds and lot and square number.	4. The appellees employed and paid appellant's agent, Waple and James, to draw the deed and obtain a continuation of title. The deed and continuation of title accurately described the property by metes and bounds, by

	lot and square number, and by reference to the plat book in the surveyor's office of the District of Columbia.
5. Shappirio *did not* read the description of the property on the deed and contract.	5. The appellee, Thomas B. Harris, *did* read the deed and continuation of title and the description of the property contained therein.
6. The salesman testified that he was misled by Goldberg's silence although the Supreme Court said that this was not clear.	6. The salesman made no representation about actual knowledge of the location of the fence and tree and said nothing about being misled by the appellant in any manner whatsoever.
7. Shortly after the sale Goldberg purchased the piece of ground in the rear of the property over which the dispute arose and had it conveyed to his wife.	7. The evidence showed nothing in the conduct of the appellant to indicate any design or intention to defraud; in fact, he said that he knew the tree was not on the lot and thought it was obvious.
8. Prior to the sale Goldberg and his wife had been using the property in such a manner as to indicate that it belonged to them.	8. The evidence did not show any prior use of the property by the appellant that might mislead a prospective purchaser; in fact, the evidence showed that he instructed his workman to place the fence inside the surveyor's pegs.

With respect to the effect of the alleged use and appearance of the property prior to and at the time of the sale, the Supreme Court said in the *Shappirio* case, pages 240-241:

> "* * * The use of the premises as a connected whole might well lead the purchaser to believe, in the absence of accurate knowledge, that it was all under the ownership of one person, and would be included in the sale

> of the property to him; and, as said by the court of appeals, we believe that Shappirio may have been ignorant of the true condition of the title. But it was also found by that court that a correct description of the property was given in the deed and recorded chain of title. Richold, who made the sale, was intrusted by Shappirio with the examination of the deed and title, and thirty days were given to complete the purchase. For this purpose Richold was the agent of Shappirio, and, it not appearing in the proof that he was mislead by the representations of Goldberg, or that by any scheme or plan he was kept from a full examination of the title and the description of the property contained in the deed furnished, he must be held chargeable with knowledge which the opportunity before him afforded to investigate the extent and nature of the property conveyed and which he undertook to examine for the purchaser. * * *"

The effect of any misleading word, act, or conduct of the vendor is covered by the Supreme Court in the *Shappirio* case, page 241, as follows:

> "* * * It is true that Richold testifies that he was misled by the silence of Goldberg, and by the situation and use of the property, and stoutly denies that he had the knowledge which a reading of the accurate description of the deed would give. But he undertook to investigate the matter and report upon the title. A casual reading of the description in the deed or examination of the recorded plat would have shown that the premises were not of a uniform depth of 80 feet, and had the L shape extension in the rear of the lot, which excludes any part of lot 2 from the premises conveyed. For the purpose of this examination Richold was the agent of Shappirio and his knowledge and means of information must be imputed to the purchaser. * * *"

The purchasers had ample opportunity to make any investigation they wished to make and did make the investigation which revealed the accurate description of the property. The Supreme court said with regard to this in the *Shappirio* case pages 241-242:

> "* * * There are cases where misrepresentations are made which deceive the purchaser, in which it is no defense to say that had the plaintiff declined to believe the representations, and investigated for himself, he would not have been deceived. Mead v. Bunn, 32 N. Y. 275. But such cases are to be distinguished from the one under consideration. When the means of knowledge are open and at hand, or furnished to the purchaser or his agent, and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor. * * *"

This Court thoroughly summarized the facts and law in the *Shappirio* case, page 191, as follows:

> "It is conceded that the small parcel of ground forming part of lot No. 2, in the rear of Lot 28, both lots being in square 977, did not in fact belong to Goldberg at the time of the sale to the plaintiff, and he, therefore, had no right to sell and dispose of it to the plaintiffs. But we, nevertheless, think it probable that the plaintiffs, or rather Jacob I. Shappirio, was really deceived and misled by appearances, as to what in fact did constitute lot 28 purchased of Goldberg. Though Goldberg may not have made any positive representations as to the extent of lot 28, it does not appear that he was required so to do by any request of Shappirio; and the latter was left free to his own investigation of the subject. The apparent relation of the yard and shed, in the rear of lot 28, to the front lot was such as was well calculated to produce the impression, from a mere inspection, that they constituted part and parcel of one entire premises. But the purchaser was bound, for his own protection, to ascertain to what the description in the contract of purchase and in the deed of conveyance did in fact apply, and what was embraced therein. That description speaks for itself, and shows plainly that it does not embrace the small parcel of ground at the rear of lot 28, and forming part of lot No. 2."

The factors tending to show lack of diligence on the part of the purchasers are more evident and those tending to

show design to defraud are less evident in this case than they were in the *Shappirio* case. In the present case the appellees personally examined the deed and continuation of title and read the description of the property, whereas, in the *Shappirio* case only the salesman read it. There are no circumstances in this case, such as the fraudulent manner in which Goldberg dealt with the ground in dispute in the *Shappirio* case, upon which one might frown, or which tend to show that the appellant was aware of the deception and that he was trying to take advantage of the appellees' ignorance.

The position of the sod and the fence, if they had been the only facts and circumstances, were such that by mere inspection a person might be misled but the purchasers were bound for their own protection to ascertain to what the description in the continuation of title and the deed did in fact apply. It would not have taken an expert to determine from the description the width of the lot. There was never any dispute about the north boundary of the lot which was indicated by a fence. A child could have taken a tape measure and stretched it from the north fence and thereby learned the location of the south boundary. The record shows that the appellees made several visits to the lot and that, from all the surrounding circumstances, doubt arose in their minds about the location of the tree. But in spite of their apparent doubt about the location of the tree they did nothing further to learn the true facts. They did not even inquire of the appellant or of the city authorities about the boundaries of the alley and the location of the tree.

This court said in the case of *Graziani* v. *Arundell*, 55 App. D. C. 21, 23:

> "* * * the plaintiff having undertaken to inspect the same, and not having been prevented by defendant or his agent from making a full inspection thereof, was bound to be governed by such inspection and could not be heard to say that he relied upon the representations of the defendant's agent as to the number of rooms on the second floor. * * *"

The line of cases which holds that the purchaser is not bound by the description in the deed or continuation of title, or the plat books all turn on the fact that the purchaser *was prevented* from making his own investigation by the vendor or his agent or that he was lulled into a sense of security by *positive statements of fact* which the vendor represented as the truth or about which the vendor should have known the truth and upon which the purchaser was entitled to rely and did rely. A mere expression of an opinion is not such a statement as will relieve the purchaser from the duty to make an inspection and investigation or from the consequences of his own investigation.

The law established by *Southern Development Co.* v. *Silva*, 125 U. S. 247, 259, clearly fits such a case as the one at bar. In that case the Supreme Court said:

> "It is essential that the defendant's representations should have been acted on by complainant, to his injury. Where the purchaser undertakes to make investigations of his own, and the vendor does nothing to prevent his investigation from being as full as he chooses to make it, the purchaser cannot afterwards allege that the vendor made misrepresentations. Attwood v. Small, supra; Jennings v. Broughton, 5 DeGex, M. & G. 126; Tuck v. Downing, supra."

In the case of *Attwood* v. *Small*, 6 Clark & F 232, 7 Eng. Rep. 684, the House of Lords said:

> "The question is not as to waiver or acquiescence in fraud but whether the parties have used that ordinary degree of vigilance and circumspection in order to protect themselves which the law has a right to expect from those who apply for its aid."

The appellant submits that the appellees did not use that ordinary degree of vigilance and circumspection a reasonable and prudent man would use when they simply concluded from certain physical surroundings that the property they were buying included all the land within certain marks and did nothing further to confirm their conclusions.

2. The evidence failed to show any misrepresentation on the part of the appellant or his agent in regard to a material fact upon which the appellees were entitled to rely and upon which they did rely.

The only statements made by the appellant or his agent by which the appellees contend they were misled and which they argue constituted actionable fraud were certain remarks by the salesman, Mr. Partlow, regarding the tree on the south side of the lot. The evidence clearly showed the remarks of the salesman were mere expressions of an opinion or judgment honestly entertained and about which the appellees felt he was honestly mistaken. The Supreme Court, in the case of *Southern Development Co.* v. *Silva, supra,* page 250, in which the complainant sought to set aside a contract on the ground of fraudulent representations, said:

> " * * * In order to establish a charge of this character the complainant must show, by clear and decisive proof:
>
> First. That the defendant has made a representation in regard to a material fact;
>
> Secondly. That such representation is false;
>
> Thirdly. That such representation was not actually believed by the defendant, on reasonable grounds, to be true;
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> Fourthly. That it was made with intent that it should be acted on;
>
> Fifthly. That it was acted on by complainant to his damage; and,
>
> Sixthly. That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true.
>
> The first of the foregoing requisites excludes such statements as consist merely in an expression of opinion or judgment, honestly entertained; and again (excepting in peculiar cases) it excludes statements by the owner and vendor of property in respect to its value."

A reading of this case and the cases which rely on it as authority will reveal that all of these elements must be present. The case at bar comes within the important exclusion mentioned in the last paragraph of the quotation cited above.

It is clear that the salesman's remarks were mere opinions and it is inconceivable how the appellees could have believed otherwise. In fact the appellees' testimony shows that they felt it was just the salesman's opinion. After testifying (App. 12) that the salesman, in response to his question as to whether the tree was on or off the lot, told him " * * * the tree is inside on your property; you get the shade tree", Thomas B. Harris testified (App. 13), "I think he thought it belonged there. He was mistaken the same as I was". The appellee, Pearle D. Harris, testified (App. 19) that the salesman said, "Yes, you get the shade tree. As far as I know, the tree belongs to you. Evidently it was left on the lot and terraced all around, so it must belong on the lot". These remarks clearly show that the salesman was drawing his conclusions from the same physical facts that were equally apparent to the appellees and not from actual knowledge of the true facts. The very conduct of the appellees by their repeated questions regarding the tree shows that there was considerable doubt in their minds as to its location and not even the most credulous person can say that the answers they got were so positive and unequivocal that all such doubt should have been erased.

The rule is settled that in an action at law where the issue is fraud the party relying upon fraud must show that the misrepresentations asserted were made either with knowledge of their untruth or in reckless disregard of the truth. *Sovereign Pocahontas Co.* v. *Bond,* et al, ... App. D. C. ...., 69 W. L. R. 699, *Public Motor Service, Inc.* v. *Standard Oil Co. of New Jersey,* 69 App. D. C. 89-91, 99 F. (2d) 124.

This court in *Sovereign Pocahontas Co.* v. *Bond, et al* (*supra*) stated the law as follows, citing many cases:

> "* * * Where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not and it is actually untrue, he is guilty of falsehood, even if he believes it to be true, and if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud."

None of the elements of actionable fraud appear in the statements of the salesman, Mr. Partlow. He did not represent a material fact to be true of his personal knowledge, as distinguished from belief or opinion. Such remarks as, "As far as I know" and "Evidently it was left on the lot and terraced all around so it must be on the lot" are clearly mere expressions of opinion.

In the case of *Lynch* v. *Mercantile Trust Co.*, 18 Fed. 486-489, the court cited with approval the following statement of the court in *March* v. *Faulkner*, 40 N. Y. 562.

> "* * * The party making the false statement must have assumed or intended to convey the impression that he had actual knowledge of their truth, though conscious that he had no such knowledge."

Not even the most gullible person could conclude from the salesman's statements that he intended to convey the impression that he had actual knowledge of the location of the tree. The statement in order to be actionable fraud must be a truly misleading word or act such as might mislead a prudent man. See *Bigelow on Fraud*, 523-528.

3. The complaint and all the evidence fails to show any design either by word or act on the part of the appellant or his agent to deceive or mislead the appellees.

The appellees did not introduce any evidence to show that the appellant purposely erected the fence or laid the sod beyond the lot line. The evidence showed (App. 34) that

the appellant instructed his workman to build a fence just as he has on the many other houses he has built; that it was always the practice to place the fence posts inside the surveyor's pegs. The evidence did not show that any different instructions were given on this occasion. The workman who erected the fence testified (App. 42) that he erected it inside the surveyor's pegs. Although the engineer's office of the District of Columbia said the fence was in the alley there was still considerable confusion in the testimony as to the exact location of the fence prior to the time the alley was paved. In any event the appellees did not show such conduct on the part of the appellant as would justify a court in sending the case to the jury to speculate on the serious charge of fraud.

Looking at the remarks of the salesman, Mr. Partlow, in the most unfavorable light the worst that can be said about it is that he was guilty of sales "puffing". He was manifestly refraining from making a positive statement about the location of the tree and limited his expression to one of opinion. The appellees do not impute any design or intent to defraud on the part of the salesman. The effect of their complaint in regard to his statements is that he and they were mistaken. (App. 12, 13, 18) In order to establish a charge of fraud they must show more than mere misrepresentation or misleading statements. In the case of *Slaughter's Administrator* v. *Gerson,* 13 Wall. 379, 20 L. ed. 627, in which the plaintiff charged the defendant with fraud in the sale of a boat and it was shown that the defendant made untrue and misleading statements regarding the draft of the boat, the court said:

> "* * * A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. * * *"

The charge of fraud is a serious one and the courts should insist that the plaintiff's evidence definitely establish all the elements of fraudulent misrepresentation before sending such a case to the jury. It is earnestly submitted that the appellees did not prove the element of actionable fraud and the judgment should be reversed.

Respectfully submitted,

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Attorneys for Appellant.

APPENDIX

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

JANUARY TERM, 1942.

No. 8150.

GILBERT S. SEEK, *Appellant,*

v.

THOMAS B. HARRIS, ET AL., *Appellees.*

Appeal from the District Court of the United States for the District of Columbia.

APPENDIX TO BRIEF FOR APPELLANT.

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS DESIGNATED BY APPELLANT.

1 Endorsed: Filed Apr 8 1940 Charles E. Stewart, Clerk.

In the District Court of the United States for the District of Columbia

Civil Action 6505

THOMAS B. HARRIS, 6507 Piney Branch Road, N. W., Washington, D. C., and PEARLE D. HARRIS, 6507 Piney Branch Road, N. W.,Washington, D. C., *Plaintiffs,*

v.

GILBERT S. SEEK, 7011 8th Street, N. W., Washington, D. C., *Defendant.*

Complaint For Damages

Misrepresentation in Sale of Real Estate

1. The plaintiffs, Thomas B. Harris and Pearle D. Harris, sue the defendant, Gilbert S. Seek, for that, on, to-wit, the 29th day of August, 1938, the said Gilbert S. Seek contracted with the plaintiffs to sell to said plaintiffs a certain piece of real property in the District of Columbia, known and described as Lot numbered 62 and part of Lot numbered 63 in A. T. Babcock and others' subdivision of lots in Square numbered 2973 in "Robert's Choice" and "Ould's First Vacancy", as per plat recorded in the Office of the Surveyor for the District of Columbia, and improved by dwelling, previously erected by the defendant and known as 6507 Piney Branch Road, N. W.

2. The defendant, Gilbert S. Seek, by and through his agent, Waple and James, Incorporated, a corporation, offered the above-described property for sale, and in connection therewith, held out and falsely represented to the public and to these plaintiffs in particular that said real property included all of the area within certain fences previously erected by the defendant, although all of the area within said fences did not in fact belong to said Gilbert S. Seek, and could not be conveyed by him to the plaintiffs, but, on the

contrary, and as the defendant well knew, a strip of land, along the southern and southwestern boundary of said property, approximately one (1) foot wide and extending approximately one hundred, nineteen (119) feet along the entire depth of the property offered for sale, then belonged to the District of Columbia.

3. This fact was well known to the defendant, but was not known to either of the plaintiffs and notwithstanding his duty in the premises, the said defendant caused and permitted his agent, Waple and James, Incorporated, to so falsely represent the extent of the property offered for sale, and the plaintiffs, relying upon the truth of such representations as being matters peculiarly within the knowledge both of the defendant, as an experienced real property owner and trader, and of his said agent, Waple and James, Incorporated, as a licensed real estate operator and broker, and believing said representations to be true, purchased the aforesaid property. The defendant, khowing that the plaintiffs had been misled as to the said boundary of the property and were thereby induced to execute the agreement, notwithstanding his duty in the premises, entered into a contract with the plaintiffs to convey said property to them without having advised them of the truth.

4. By reason of the fraud and false representation set forth above, the plaintiffs believed that they were contracting to acquire approximately one hundred, nineteen (119) more square feet of land than actually was conveyed to them and, because of said belief, agreed to pay for said property a certain price, to-wit, Ten Thousand, Two Hundred, Fifty Dollars ($10,250.00), although the property actually conveyed to them by the defendant did not include said one hundred, nineteen square feet and was worth much less than said purchase price, which the plaintiffs had been induced to contract to pay only through the above-mentioned misrepresentation, and was, in fact, worth only the sum of Eight Thousand, Two Hundred, Fifty Dollars ($8,250.00).

5. Shortly after the purchase of the property from the defendant, the District of Columbia converted to actual public use the strip of land described above and belonging to it, removed therefrom the fence erected by the defendant and supposedly included in the property sold to plaintiffs, and levelled said strip down to the alley's grade, which was more than two feet below the grade of plaintiffs' lawn, thus necessitating the erection by the plaintiffs, at considerable expense, of a retaining wall on the true boundary of their property. Upon the aforementioned strip of land there stood, at the time the property was offered for sale to the plaintiffs, a certain tree of considerable size and of a species suitable for a shade tree, which greatly improved and enhanced the appearance and value of the property, which tree, the defendant's agent, Waple and James, Incorporated, by and through its employee and salesman, one Louis L. Partlow, expressly represented to the plaintiffs as standing upon the defendant's property and to pass by his deed, and the plaintiffs relied upon said representation and believed they would acquire ownership of said tree. But, as the defendant well knew, this tree was not upon the defendant's property and did not in fact pass by his deed to the plaintiffs, and the District of Columbia, before paving the adjoining alley, caused said tree to be removed. No other tree remains upon the plaintiff's lawn and it will require many years for a similar tree to grow to equal size, and in consequence thereof, the plaintiffs are, and for a long period of time will be, deprived of the possession of an ornamental and useful shade tree near their residence; further, the District of Columbia's operations, necessitated by the defendant's original trespass upon the public property, have greatly marred the plaintiffs' lawn and the cost of repairing the same is considerable.

6. Plaintiffs further aver that one corner of their house, after the boundary had been properly established, is now exactly upon the edge of said public alley and is exposed to damage caused by being struck by passing vehicles, and

there is no space for the erection of any shield over said corner without trespassing upon the public area.

7. Wherefore, the plaintiffs bring this action and claim damages of the defendant in the sum of Two Thousand Dollars ($2,000.00).

FRANCIS L. NEUBECK,
JOHN F. O'CONNELL and
JOSEPH I. CAVANAUGH,
Attorneys for Plaintiff,
1385 National Press Building,
Washington, D. C.

By: JOHN F. O'CONNELL

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4 *Motion to Dismiss*

The defendant, Gilbert S. Seek, respectfully moves the court to dismiss the above-entitled action and as grounds therefore says:

1. The complaint fails to state a claim against defendant upon which relief can be granted.

2. The quantity of land in lot 62 and part of 63 was a matter equally within the knowledge of the plaintiffs and the defendant.

3. The complaint shows on its face that the subject matter of the sale was lot 62 and part of lot 63 in square 2973, the size of which was a matter of public record, and the plaintiffs were not justified in relying on any representations of the defendant's agent with respect to the boundaries of said lots, the said boundaries being ascertainable either from the public records or by survey.

4. There is no allegation that the defendant's agent did anything to prevent the plaintiffs from ascertaining the correct boundaries of the lots in question.

5. The doctrine of caveat emptor applies.

6. Other reasons appearing on record.

ARTHUR J. HILLAND

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5 *Order Overruling Motion to Dismiss*

Upon consideration of the defendant's motion to dismiss the complaint herein, it is by the Court this 19th day of June, 1940.

ORDERED That the said motion to dismiss be, and the same hereby is, overruled.

DANIEL W. O'DONOGHUE,
Justice.

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6 *Answer to Complaint For Damages For Misrepresentations in Sale of Real Property.*

First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted in favor of the plaintiffs.

Second Defense

The defendant admits the allegations contained in paragraph 1 of the complaint but denies the allegations contained in paragraphs 2, 3, and 4 of the complaint. The defendant denies the allegations in paragraph 5 of the complaint as to the alleged representations made by the defendant; and as to the other allegations contained in paragraph 5 and the allegations contained in paragraph 6 the defendant says that he is without sufficient knowledge or information to form a belief as to the truth thereof and therefore denies the same, and also denies each and every other allegation contained in the complaint.

ARTHUR J. HILLAND
DeWITT S. HYDE
Shoreham Building
Attorneys for Defendant

Service of a copy of the foregoing answer is hereby acknowledged this 24th day of June, 1940.
FRANCIS L. NEUBECK
Attorney for Plaintiff

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8 *Stipulation as to Reporter's Transcript of Evidence*

It is hereby stipulated by and between the parties to the above-entitled action, through their respective attorneys of record, this 9th day of December, 1941 as follows:

1—That the reporter's transcript of evidence filed herein contains all the evidence introduced at the trial except the testimony of the witnesses, Jerome S. Murray and Henry Raymond Wasser.

2—That the witnesses, Jerome S. Murray and Henry Raymond Wasser, were called by the plaintiffs for the sole purpose of proving the plaintiffs' damages and said witnesses testified only in respect thereof and their testimony was sufficient to support the amount of damages awarded by the verdict.

ARTHUR J. HILLAND
DeWITT S. HYDE
Shoreham Building
Attorneys for Defendant

JOSEPH I. CAVANAUGH
2135 Pennsylvania Avenue, N. W.

FRANCIS L. NEUBECK
National Press Building
Attorneys for Plaintiffs

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126 *Verdict and Judgment*

This cause having come on for hearing on the 10th day of October, 1941, before the Court and a jury of good and lawful persons of this district, to wit:

Thomas H. Young	Meyer Feifey
Sterling D. Balderson	Robert W. Gordon
Chester E. Martin	William Moss
John H. Queen	Walter Ogur
Charles H. Brown	Robert H. Hampson
Kenneth M. Ogden	Melvin H. Mandell

who, after having been duly sworn to well and truly try the issues between Thomas B. Harris and Pearle D. Harris, plaintiffs and Gilbert S. Seek, defendant, and after this cause is heard and given to the jury in charge, they upon their oath say this 14th day of October, 1941, that they find the issues aforesaid in favor of the plaintiffs and that the money payable to them by the defendant by reason of the premises is the sum of Four Hundred ($400) dollars.

Wherefore, it is adjudged that said plaintiffs recover of the said defendant the sum of Four Hundred ($400) dollars together with costs.

CHARLES E. STEWART,
Clerk,

By R. PAGE BELEW,
Assistant Clerk.

By direction of
Justice JENNINGS BAILEY

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127 *Motion to Set Aside Verdict and Judgment and to Have Judgment Entered in Accordance with Defendant's Motion for a Directed Verdict*

The defendant, Gilbert S. Seek, by his attorneys of record, respectfully moves the Court to set aside the verdict of the Jury and the judgment entered thereon in the above-entitled action and to enter judgment for the defendant in accordance with his motion for a directed verdict, and as grounds therefor says:

1—After the plaintiffs' opening statement, at the close of the plaintiffs' evidence, and at the close of all the evidence, defendant moved the Court for a directed verdict for the defendant.

2—The action was submitted to the Jury subject to a later determination of the legal questions raised by the defendant's motion for a directed verdict made at the close of all the evidence.

3—The quantity of land was a matter equally within the knowledge of the plaintiffs and the defendant.

4—The evidence showed that the defendant's agent did nothing to prevent the plaintiffs from ascertaining the correct boundaries of the land in question.

5—The evidence showed that the plaintiffs had opportunity to make any investigation that they desired to make and that they did, in fact, have an investigation made of the title and dimensions of the land in question.

128 6—The deed from the defendant to the plaintiffs and the report that the plaintiffs obtained from the Title Company contained the correct description of the land by lot numbers, square number, reference to a plat in the Surveyor's Office and by metes and bounds.

7—Other reasons apparent of record.

ARTHUR J. HILLAND
DEWITT S. HYDE
Shoreham Building
Attorneys for Defendant

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129 *Order Overruling Motion to Set Aside Verdict and Judgment*

This action came on to be heard at this term of Court upon the defendant's motion to set aside the verdict and judgment, and upon consideration thereof, it is, this 30th day of October, 1941,

ORDERED That the motion to set aside the verdict and judgment herein be, and the same hereby is, overruled.

JENNINGS BAILEY,
Justice.

Approved as to form:

ARTHUR J. HILLAND
DeWITT S. HYDE
Attorneys for Defendant

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11 **Thomas B. Harris.**

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Direct Examination

By Mr. Cavanaugh:

Q. Your full name is Thomas B. Harris? A. Thomas B. Harris, 6507 Piney Branch Road, Northwest.

Q. You are one of the plaintiffs in this suit? A. Yes, sir.

Q. Now, directing your attention to the summer of 1938, did you and Mrs. Harris inspect a house, or the house in which you now live, with the idea of purchasing? A. No, we merely looked at it from curiosity.

Q. You went out to see it? A. Yes, we went out to see it and Waple and James had it for sale.

The Court: Just answer the questions.

By Mr. Cavanaugh:

Q. Who went out there, Mr. Harris? A. Who went out there?

Q. Yes, who went out there together in the party? A. My wife and myself.

Q. Alone? A. Yes.

Q. Was there someone with you at any time? A. Not the first time.

Q. On how many occasions did you inspect the property?

A. Four or five times and on two occasions the agent

12 was there.

Q. I see. A. Maybe three.

Q. Now, Mr. Harris, on these occasions when you looked at the property before you contracted to purchase it, tell us what you noticed about the lines of the property. A. Well, the property had all been finished.

Q. Speak a little louder, please. A. The property had all been finished and was graded and sodded down on this area on the south side, and this tree that we had. Further down from the corner of the house to the garage, including the

entire length of the garage, there was another fence 35 feet long, embedded in the ground with posts and wire. This fence went from the corner of the house to the garage and had been attached to the garage, and the concrete walk from the porch up to this corner of the house opened into a gate which was—well, this concrete walk also extended into the alley. From the corner of the house to where the corner in the street, in the alley, was an imaginary line had been sodded. It was 14 inches, I imagine, just enough for a lawn mower to go by to cut the sod.

That walk-way was around the house and it looked as if it belonged to the lot. It was on a line with the fence, and it looked like—we never questioned that the fence was on his line. It was a permanent fence and had all the earmarks of a line fence.

The grade of the front lawn was camouflaged to make it appear different from what it was.

13 Q. Tell us what you saw. A. It looked good from the appearance, made a good appearance. The contour of the lot and the dimensions were amply sufficient for the house. It was in conformity; that was the way we judged it.

When you see the tree, it is a guide for the contour of the lot.

Q. Now, Mr. Harris, the front end of this fence that you refer to, where was that with respect to the southeast corner of your house when you looked at it? A. You mean—Ask that question again, please.

Q. Where was the front end of the wire fence with respect to that southeast corner. A. It didn't extend any further than the southeast corner, and the post was outside of the corner. First, on the corner of the house there was a post and it went out straight, and the fence went this way (indicating) and met the sidewalk.

Q. By lining up this fence, did it give the appearance that the corner of the house was on the edge of the lot? A. No, it didn't.

Q. What appearance did it give? A. It had an appearance of having about two feet of space, 14 to 18 inches.

Q. I believe you said a lawn mower could go around it? A. Yes, a lawn mower could go around.

Q. Now, with regard to the side in front of the house, describe it briefly. Just how did it appear? A. Well, the side from the front part was sodded and had a slight
14 sink.

Q. Was it terraced? A. Yes, sir.

Q. Where was the tree with respect to the terrace? A. It was just on the edge of the terrace, about three feet from the sidewalk, or four feet from the sidewalk.

Q. Was there sod laid beyond the tree? A. Yes.

Q. What was the nature of the surface of the alley? A. It looked like it had been gravel or charcoal, a kind of hard surface. There wasn't much traffic. That alley was behind a vacant lot.

Q. Now, what was the name of the salesman that accompanied you on one or more occasions? A. Mr. Partlow.

Q. By whom was he employed? A. By Waple and James.

Q. How did you get in contact with him? A. By going and looking at the property. That is where we met him.

Q. He was on the premises? A. He was on the premises, yes, and showed it to us.

Q. Mr. Harris, tell us what conversation transpired between you and Mr. Partlow with respect to the line of that lot. A. Well, Mr. Partlow—we went over to Mr. Thompson's house next door. We were neighbors, went in there and we talked the general terms over embodied in the sale and while we were over there—oh, we went out and took another look, and I says: This tree is on the line; is this on the line?

15 Q. What did you say? A. This tree is on the line or off the line? I asked that and he said: No, the tree is inside on your property; you get the shade tree.

So we went back and he made the same statement to Mr. Thompson, in Mr. Thompson's presence.

Q. Did he make any statement or point out anything which he used to support the contention that you were getting the shade tree? A. Looking and glancing at it like I was I should say the lot looked like—it looked like as if it was part of the inside lot.

Q. Did it look that way to you? A. It did look that way to me, and I should say he thought it belonged there.

Q. What is that? A. I think he thought it belonged there. He was mistaken the same as I was.

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Mr. Cavanaugh: You may examine.

Cross-examination

By Mr. Hilland:

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Q. Mr. Harris, who prepared the deed from Mr. Seek to you? A. I presume that Waple and James did.

Q. You paid them for preparing it, did you not? A. Yes, sir.

Q. And they prepared it at your request? A. Yes, sir.

Q. Waple and James also obtained an examination or search of title for you, did they not? A. Yes.

Q. They obtained that at your request? A. Yes.

Q. You paid Waple and James for obtaining that certificate of title? A. The whole bill is included in one thing.

Q. Have you ever looked at that deed and certificate of title? A. Yes, I have.

Q. In these two papers did you ever observe how the property was described? A. Yes.

Q. How did you find it described? A. I could not explain it.

Q. Sir? A. I never could understand it.

Q. Did you see any lot numbers? A. Yes, I saw lot numbers.

Q. Did you see the square numbers? A. Yes.

23 Q. Did you see a reference to a plat of the Surveyor's office? A. I don't remember.

Q. Did you see the description of the property by metes and bounds? A. I read the entire deed several times, the contract several times.

Q. Did you see that it was described by metes and bounds? A. Yes.

Q. It was so described? A. I think so.

Q. Mr. Harris, did I correctly understand you that you testified on direct examination that the fence ended right at the southeast corner of the house? A. Yes, sir.

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Q. Now, that corner post, the end of the fence was at your southeast corner? A. Yes.

Q. Which is the corner that is right on the alley line? A. Yes.

Q. And that post, that end post, was right at that

24 corner and right up against it? A. Immediately against the corner on the outside.

Q. And then the fence ran along your lot up to the front of your garage? A. Yes.

Q. Now, near the front of your garage there is a telephone pole, is there not? A. Yes.

Q. When you first saw the place was that pole inside or outside? A. The telephone pole was put there after we moved. It is a light pole which wasn't there when be bought the place.

Q. It wasn't? A. It was put there after we moved in.

Q. When was that? A. It was probably put there in a month's time, no longer than a month after we moved in the place, probably in October or November.

Q. Was there any telephone pole in front of your garage at that time? A. No.

Q. When you came there? A. No.

Q. Was there a telephone pole anywhere along that lot line? A. No.

Q. On the alley side? A. No. It included my piece of property. I am not talking about the entire alley.

25 Q. The pole was put there after you moved in, inside or outside of the fence? A. Immediately outside of the fence.

Q. Have you measured the length of the fence that was disturbed by the District surveyors? A. Yes.

Q. How long was it? A. Thirty-five feet long practically.

Q. What kind of fence posts were in there? A. The posts were four by four.

Q. Were they wood or steel? A. Wood, two and a quarter feet in the ground. I imagine they were five foot posts, two feet in the ground.

Q. What type of wire did they have? A. Fence wire.

Q. Woven wire? A. Yes, woven.

Q. When you had your fence replaced, did you use the same wire? A. Part of it.

Q. But you put in steel posts? A. I put in steel posts.

Q. At the entrance to your garage was there any fence in front of your garage? A. There was about eight or ten inches between the garage and the original post, with a small piece of wire which went from the post to the garage corner.

Q. In other words, that fence ran from the back of the house down the alley to a point eight inches from the front of it? A. It missed the garage corner by eight inches.

26 Q. And then it had a little piece of fence that filled in the end? A. It did.

Q. That was the original fence that Mr. Seek put up there? A. Yes.

Q. That was eight inches from that point? A. Yes.

Q. How much space is there between the fence and the front of your garage now? A. I don't think there is that much.

Q. It is approximately eight inches now? A. I haven't looked at that part of it. It probably touches it.

Q. There is a post there now near the front of your garage and then a piece of fence that runs from there to the garage? A. Yes.

Q. Is that somethink like it? A. Yes.

Q. It is about what it was when you came there? A. It was much different. I don't believe the post is sunk—this iron post is sunk right against the grade at the alley paving.

Q. That particular point in the fence put up by Mr. Seek originally, that particular post was on your property, wasn't it? A. Yes, sir.

27 Q. He didn't encroach on the alley there? A. No, not at that point that I could determine.

Q. The fence continued from there to your house in an easterly direction down the allew. How long was the space from the end of the fence to where the fence began again? A. From the corner of the garage there was no space. It was open space.

Q. How wide was that open? A. It is about thirty-eight feet from the corner.

Q. To the end of that alley? A. Yes.

Q. From that point at the end of your lot, coming back to your garage, there is a piece of fence, is there not? A. Yes.

Q. How long is that piece? A. I don't think it is over six or eight feet.

Q. About eight feet? A. Not much more.

Q. Is that fence that Mr. Seek had erected there? A. Yes.

Q. Today that fence is there just as it was erected by him? A. Yes, absolutely.

Q. Did you measure the distance from that piece of fence clear down to the grade of the alley? A. No.

Q. Do you know how long the distance of the fence is along there? A. No, I don't know.

28 Q. But the fence was built by Mr. Seek, wasn't it? A. I suppose so.

Q. It is there just as he built it? A. Yes.

Q. None of that fence encroaches on the alley? A. No, it comes down to a point—it was cut off and it was graded

down to a sliver. It was a wedge-shaped cut off the sidewalk and the front end from the sidewalk was graded down to nothing. By the time it got to the garage, it was practically—

Q. (interposing) When it got to the garage, it was entirely on your property? A. It seems to me it is. I don't know that, though.

Q. For how long a distance was there an encroachment of that fence on the alley? A. It runs from eight inches to fourteen inches. It is fourteen at the gate.

Q. It doesn't jump up? As I understand your testimony, at the front of the garage the fence was on your lot and there was no encroachment. Isn't that what you testified? A. I should say that I could not discover much difference. There was a difference. I don't know how many inches, but there was a difference. It is closer now than it was before, but I don't know how many inches it is closer or how many inches from the garage. It is about six to eight inches; it might have been fourteen inches before.

Q. It was inside a telephone pole before? A. Yes.

29 Q. It was inside of that. The existing fence is how far from that telephone pole there? A. I would say eight or nine inches.

Q. Wasn't it fourteen or fifteen inches? A. If it was eight or nine at the garage it would be—as it increases it comes back this way (indicating). The distance was a wedge-shaped property.

Q. On direct examination a little while ago when you started talking about the fence, didn't you say that the corner post at the front of the garage as it was built by Mr. Seek was put where your post is now? A. I don't know as I said it was, but the post didn't touch the garage. The fence didn't touch the garage. There was fourteen inches in between the corner of the garage and the post. This iron post that I have got there is only about a one-inch post, and the one they took out is four inches. That would be quite a few inches.

Q. Do you remember seeing Mr. Partlow in 1940 in connection with the refinancing of your first trust? A. Yes, I do.

Q. At Waple and James' office? A. Yes.

Q. What conversation did you have at that time? A. I went to get some information from Waple and James and met Mr. Partlow there, and we had a conversation that bordered on this case.

Q. What did you say to him? A. I told him that I thought I had been mistreated about it. I thought that they had camouflaged the lot and made it appear different, and I had tried to get Mr. Seek—Mr. Waple had written him a letter and they paid no attention to it whatever.

I acquainted him with all the reasons, and he says: I am with you in this proposition. I agree with you. They should have done something about it.

I was very much—

Q. (interposing) At that time did you accuse Mr. Partlow of defrauding you? A. No, I think he was an innocent man. He was deceived the same as I was.

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Pearle D. Harris,

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Direct Examination

By Mr. Cavanaugh:

Q. State your full name, Mrs. Harris. A. Pearle D. Harris.

Q. You are one of the plaintiffs and the wife of Mr. Harris? A. I am the wife of Mr. Harris.

Q. Mrs. Harris, you have heard Mr. Harris' testimony, of course. Did you accompany him on all of the occasions that he inspected this house? A. I found the house; I took him out.

Q. You were the first one to see it? A. Yes, sir. I called on my friend next door, who had—

Q. (interposing) Just a minute. Were you present on those occasions when Mr. Partlow was there? A. Yes, sir.

Q. Did you take part in the conversation or were you present when the conversation took place with regard to the tree? A. I was standing out on the lawn.

Q. On the lawn? A. Yes, when the conversation occurred and whatever was said about it. Afterwards I was present at all times.

Q. Were you present in Mr. Thompson's house nearby when there was some conversation? A. Yes, sir, sitting around the table in the dining room when we agreed to make the agreement.

Q. Where was the contract signed, Mrs. Harris? A. Down in Waple and James' office.

Q. Down in Waple and James' office? A. Yes, sir.

Q. Tell the jury just what conversation occurred on the front lawn that day with regard to the boundary or to the tree. A. Well, as nearly as I can remember, we were standing out there talking about the tree, and there was poison oak or poison ivy around it, and we first remarked about that, I believe.

Mr. Harris asked if the tree belonged to the lot.

Q. Whom did he ask? A. Mr. Partlow, and he said: Yes, you get the shade tree. As far as I know, the tree
34 belongs to you. Evidently it was left on the lot and terraced all around, so it must belong on the lot.

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37 Cross-examination

By Mr. Hilland:

Q. Mrs. Harris, do I understand correctly that that end post on that fence was on the south side of the house? It would be the south side? A. Yes, the side where the alley is, on the alley side.

Q. It was on the side? A. Yes, on the alley.

Q. How far from the corner was it? A. Right at the corner because that is where the hinge of the gate was fastened.

Q. If the fence had been extended up there instead of the gate, the fence would have been up against the house? A. Why, naturally; he would have to fasten it on something.

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Daniel Wilson Thompson

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Direct examination

By Mr. Cavanaugh:

Q. What is your full name, please? A. Daniel Wilson Thompson.

38 Q. Where do you live? A. 1913 Luzerne Avenue, Silver Spring, Maryland.

Q. Where were you living in August of 1938? A. I was living at 6509 Piney Branch Road.

Q. Are you acquainted with Mr. and Mrs. Harris, the plaintiffs here? A. Yes, sir.

Q. Mr. Thompson, were you present some time in the summer of 1938 when a conversation took place between Mr. and Mrs. Harris and Mr. Partlow, a real estate salesman? A. Yes.

Q. Do you recall anything said by any of them with regard to the lot line of the house at 6507, the house on the alley? A. Well, the only thing I can recall is that Mr. Harris asked Mr. Partlow about a tree that was on there.

Q. Were you present when that took place? A. Yes.

Q. Where did it take place? A. It took place in front of the house; I think it also took place in our house.

Q. Referring first to the conversation outside of your house, tell us, sir, what was said. A. Mr. Harris looked at the lot line and he asked him if the tree was on his lot, and he told him it was.

Q. Was there any reply to that? A. Mr. Partlow said it was.

Q. He said definitely that it was? A. Yes, sir,
39 he said definitely that it was.

Q. Was there any other conversation outside of the house with regard to the line or the boundary of the lot in your presence? A. I don't recall anything else.

Q. There was a later conversation or conversations in your house, was there not? A. I don't remember any other.

Q. Did you have them in your house at a later date or later time? A. I was in there when they signed the contract in our house.

Q. There was a discussion as to the terms, price, and so forth for that house; is that right? A. There might have been. I don't recall the terms or anything.

Q. The matter came up two times, once outside and once in your home? A. Yes, it was brought up in the house.

Q. Now, referring to the conversation in the house, who was present there? A. I think Mr. and Mrs. Harris, and Mr. Partlow, and myself, and I think my wife was present too.

Q. This house that you are referring to, in which you were then living, was the other house that Mr. Seek had built? A. Yes.

Q. You had bought it? A. We had bought it.

40 Q. What was said at that conversation in your house with reference to the tree or boundary, if anything? A. I don't know of anything being said about the boundary. The only thing I knew of was the question of the tree.

Q. The matter of the tree came up? A. Yes, sir.

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41 Cross-examination

By Mr. Hilland:

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Q. When Mr. Partlow was asked about the location of that tree, do you remember just exactly the words of the question that was put to him? A. I know Mr. Harris was standing there and he was looking back at the line of the alley, from the front, and he asked Mr. Partlow if the tree —he said something about a nice shade tree, and Mr. Harris said: Is that tree on our lot?

42 Q. Didn't Mr. Partlow reply?

Mr. Cavanaugh: I object, if your Honor please.

The Court: I overrule the objection.

By Mr. Hilland:

Q. Didn't Mr. Partlow reply to the effect that so far as he knew the tree was on the lot? A. No, sir. He said it was on the lot.

Q. Do you remember the exact words he said? A. He said it was—I can't remember.

Q. He didn't say: As far as I know? A. No, sir.

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Marion W. Chinn

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43 Direct examination

By Mr. Cavanaugh:

Q. State your full name, please. A. Marion W. Chinn.

Q. What is your employment, sir? A. Computer in the Surveyor's Office in the District Building.

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45 Cross-examination

By Mr. Hilland:

Q. Mr. Chinn, when your office made that wall check—I think you said it was April 8, 1938—the footings
46 were in and the wall had been built up just as it is today; is that right? A. The footings were in there

and the wall was located on these footings. Whether that condition existed at that date I am not able to testify.

Q. The way that house is built, it received the approval of the authorities from the District Building Department? A. The location was submitted to the Building Inspector, and he made no comment.

Q. It was entirely proper to have the house right up to the corner line? A. Yes.

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John J. Curtain

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Direct examination

By Mr. Cavanaugh:

Q. What is your full name, Mr. Curtain? A. John J. Curtain.

47 Q. What is your employment? A. I am assistant engineer in the Highway Department.

Q. Of the District of Columbia? A. Yes, sir, the District of Columbia.

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Q. In surveying the alley before paving it, did you find any obstructions? A. Yes, sir. We found a fence about a foot in the alley.

Q. Do you recall what lot that was adjacent to? A. Sixty-two, yes, sir.

Q. Go ahead, sir. A. I found a fence projecting there in the alley for about twenty feet along from the edge of the garage up to a point about, I would say, seventeen

48 or eighteen feet west of the building, up to where the chimney was, and also I found a tree about two and a half feet in the alley.

Q. Repeat that. A. I found a tree about two and a half feet in the alley.

Q. Was notice sent to the property owner? A. Yes, sir.

Q. There was? A. Yes, sir.

Q. Who actually removed the obstructions? A. I think my contractor did.

Q. Your contractor? A. Yes, sir.

Q. What did he take down, do you know? A. He took down a wire fence with wooden posts about fifteen feet long, and I think he had to cut some cement that projected out in the alley about a foot.

Q. Are you referring to a walk? A. Yes, sir, a cement walk.

Q. Did he take down the tree? A. No, we took the tree down. The District did.

Q. The District took down the tree? A. Yes, sir.

Q. Was it necessary to grade down that lot? A. Yes, sir, I think they had to cut off about two feet on the terrace.

Q. Do you recall the tree, Mr. Curtain? A. Yes, sir.

Q. What size was it approximately? A. About
49 eight or ten inches in diameter, a pine tree, sitting about two and a half feet above grade and two feet in the alley.

Mr. Cavanaugh: You may examine.

Cross-examination

By Mr. Hilland:

Q. I understood you to say that the tree was about two feet above grade and two feet in the alley? A. Yes, sir.

Q. Now, Mr. Curtain, when you went out to put in the alley, did you have a new survey made at that time? A. No, sir, we used the Surveyor's points that the Surveyor put in that lot.

Q. Was that the one that the Surveyor's Office made on March 5, 1938? A. I presume so. I guess it was. It was the last survey on the lot.

Q. Then it was March 5, 1938? A. Yes, sir.

Q. When you went in there did you put new surveyor's stakes in there? A. Yes, sir. When the surveyors survey they put it on the property line. When I survey I put it in the center line of the alley.

Q. The center line of the alley? A. Yes, sir.

Q. How do you locate that? A. With transits from the surveyor's point on the building line.

50 Q. Were there some points there? A. Yes, sir, three pegs on that lot line, and the corner of the house was on the line.

Q. Well, where is the first surveyor's peg? A. It is a copper on the north alley line, about twenty feet from the building line of Piney Branch Road.

Q. On the sidewalk? A. No.

Q. Is it difficult to see? A. Not for me to see.

Q. Where was the second surveyor's stake? A. It was at a point about sixty feet beyond the building, I think it was. I can't tell you exactly from this.

Q. From the back of the building? A. Yes, sir.

Q. What kind of stake was there? A. A peg. It was driven in with a tack in it.

Q. A tack? A. Yes, sir. It was right about here, sir (indicating). This is a peg there.

Mr. Cavanaugh: Let me hold it up. Do you want to come around here, Mr. Hilland?

The Witness: It was a peg out here (indicating) and a copper out here, and a peg at the corner of the lot.

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55 Q. Did you ever measure the distance near the opening of the garage, where there was no fence? A. But I measured from the corner of the fence at the east end up to the garage, and that fence was all right. It was right on the line.

Q. That fence is still there today? A. Yes, sir.

Q. How many feet of it? A. About sixty-six feet.

56 Q. About sixty-six feet? A. Yes, sir.

Q. The same kind of fence as that which you tore down? A. Yes, sir.

Q. All that was within the lot line? A. Yes, sir.

Q. None of it— A. (interposing) Had to be moved.

Q. In the alley? A. No, sir.

Q. Do you know how many feet of that fence, of that sixty-six feet, was on the plaintiffs' property. A. No, I don't.

Q. Some of that sixty-six feet is on their property? A. On whose property?

Q. Mr. and Mrs. Harris'. A. Oh, yes, sure.

Q. How many feet of that fence, of that sixty-six feet? A. I would say about forty-five feet of it.

Q. On their property? A. Yes, sir.

Q. That has never been disturbed? A. No, sir.

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59 **Edna H. Thompson**

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Direct Examination

By Mr. Cavanaugh:

Q. Give us your full name, Mrs. Thompson. A. Edna H. Thompson.

Q. You are the wife of Mr. Daniel Thompson? A. Yes, sir.

Q. In August of 1938, Mrs. Thompson, where were you living. A. 6509 Piney Branch Road.

Q. A little louder, please. A. You will have to listen close. I have a bad cold. 6509 Piney Branch Road.

Q. Mrs. Thompson, you are acquainted with Mr. and Mrs. Thomas Harris? A. Yes.

60 Q. Do you recall an occasion when Mr. and Mrs. Harris were inspecting a house adjoining the one in which you were living at the time, with the idea of possibly buying it? A. Yes.

Q. Were you present, Mrs. Thompson, on an occasion— First of all, let me ask you: Were you familiar with the property that they subsequently bought? A. Yes, I was quite familiar with it.

Q. How did it happen? A. I am living next door and the house was empty, and so many people came in to look at it, and I was right on the property, and I showed that house quite a lot. First, because I was there, and I——

Q. (interposing) To persons other than Mr. and Mrs. Harris? A. Oh, yes.

Q. Do you recall a conversation that took place between Mr. and Mrs. Harris and Mr. Partlow on the front lawn of that house at the time they were looking at it? A. Yes.

Q. With regard to the size of the lot? A. Yes.

Q. Tell the Court and jury what you recall of that conversation. A. Well, Mr. Harris seemed to like our lot. We had quite a large yard, and he said: His yard was terribly small.

Mr. Partlow said: You are getting a lovely shade tree on your lot. That is all that was said, and that was repeated when he made the final statement.

61 Q. Where? A. In my house.

Q. Were you present? A. Yes.

Q. Do you recall his exact words with reference to that tree, Mr. Partlow's words? A. Well, he had sort of repeated those words: that you are getting the shade tree. Mr. Harris said that the lot was so much smaller, and he said: You are getting a shade tree, and he said: I will have the yard and you have the tree. That is all there was to it.

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68 By Mr. Hilland:

Q. On direct examination, Mrs. Thompson, you testified that Mr. Partlow said: You are getting a lovely shade tree. Where did he make that statement? A. Right
69 on the lawn and then in my house when the deal was closed. I called Mr. Partlow in and Mr. Harris said: I think the house is all right but I don't like that small yard, and Mr. Partlow said: You are getting a lovely shade tree over on your lot.

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120 Mr. Cavanaugh: That is the plaintiff's case, your Honor.

Mr. Hilland: I would like to make a motion.

The Court: I will ask you to step outside, gentlemen. Don't discuss the case with anyone in the meantime.

(Thereupon the jurors retired from the court room.)

Motion for Directed Verdict

The Court: Will you make your argument short?

Mr. Hilland: If you Honor please, I wish to move for a directed verdict on behalf of the defendant on the grounds which will appear in my argument. The first one is, that from the testimony—

The Court (interposing): I will allow you ten minutes.

Mr. Hilland: Sir?

The Court: I will allow you ten minutes.

Mr. Hilland: I will try to limit myself.

The Court: You will have to.

Mr. Hilland: Mr. Harris testified thusly on page 7:

"Answer: Looking and glancing at it like I was I should say the lot looked like—it looked like as if it was part of the inside lot."

"Question: Did it look that way to you?"

"Answer: It did look that way to me, and I should say he thought it belonged there."

He is talking about Mr. Partlow.

"Question: What is that?

121 "Answer: I think he thought it belonged there. He was mistaken the same as I was."

In other words, you have them predicating alleged fraud on the part of Mr. Partlow when they said, or Mr. Harris said in his own testimony, that Mr. Partlow "was mistaken the same as I was." He said: the same as I was.

Now, in Mrs. Harris' testimony she said:

"Answer: Mr. Partlow, and he said: Yes, you get the shade tree. As far as I know, the tree belongs to you."

"As far as I know, the tree belongs to you," that is what Mr. Partlow said when he was asked about the tree, according to Mrs. Harris' testimony.

I submit, if your Honor please, neither one said or testified that he made a positive statement, but says: as far as I know, the tree belongs to you.

The Court: Was this in the testimony?

Mr. Hilland: Yes, sir.

The Court: Is that all the testimony?

Mr. Hilland: Well, no, that is not quite all the testimony. That is the material part. Here was the question:

"Question: Tell the jury just what conversation occurred on the front lawn that day with regard to the boundary or to the tree."

"Answer: Well, as nearly as I can remember, we were standing out there talking about the tree, and there was poison oak or poison ivy around it, and we first remarked about that, I believe.

"Mr. Harris asked if the tree belonged to the lot."

"Question: Whom did he ask?"

122 "Answer: Mr. Partlow, and he said: Yes, you get the shade tree. As far as I know, the tree belongs to you. Evidently it was left on the lot and terraced all around, so it must belong on the lot."

In other words, that was a conclusion that Mr. Partlow had drawn and which was the same as they had drawn. That is qualified.

The Court of Appeals wrote a decision recently about the difference between "I am informed" and making a positive statement. Here, according to Mrs. Harris, he simply said, in effect, that I have drawn a conclusion which is so or not: As far as I know, the tree belongs to you.

The Court: Did he say that possibly the tree was on the lot? Did he say that?

Mr. Hilland: He said: Yes, you get the shade tree. In other words, he followed it up with that statement.

Then you have the testimony of Mr. Harris. Mr. Harris testified and said: Yes, but he followed his testimony with the statement that Mr. Partlow was mistaken just as I was mistaken.

The other point I want to call your Honor's attention to is the fact that Mr. Harris testified on cross-examination that the deed was prepared by Waple and James at his request, and the deed they conveyed. He got a search or examination of title, at his request, through them. The deed they conveyed—he admitted on cross-examination that the title report and the deed described the property by the lot numbers and by reference to a plat in the Surveyor's Office by metes and bounds.

123 That testimony, if your Honor please, brings this case within the decision in Shappirio vs. Goldberg.

The Court: Have you that case there?

Mr. Hilland: Yes, I have.

I have two opinions: one by the Court of Appeals and one by the Supreme Court. Here is the Supreme Court decision (handing a book to the Court).

The Court: I have read that.

Mr. Hilland: In the Court of Appeals decision, as I recall it, one of the cases shows that this lot was represented as having a frontage of 40 feet.

The Court: I read this decision this morning.

Mr. Hilland: The Court went into these circumstances constituting fraud and they point out that it could not form the basis of fraud for the reason that there was no concealment and no effort on the part of the defendant to prevent the plaintiffs from making any inspection that they wanted to make or any other further investigation. In fact, in this case, just as in the case at bar, the purchasers made their own investigation by having the deed prepared, which described the property by metes and bounds and also by the title examination report.

It seems to me, if your Honor please, that a study of this case clearly shows it is right in point on the question of law involved. I concede that the remedy sought in that case was a different one and there were some other questions involved in the case, but the real point that was involved in that case, namely, as to whether or not there was fraud under those circumstances is also involved in the case at bar.

124 If I may, I would like to read from this case, at page 240:

(Thereupon Mr. Hilland read from the decision referred to.)

The Court: I have read that this morning.

Mr. Hilland: You will remember that in this case Goldberg, the owner of the property, represented that the property was rectangular in shape. He did it by misrepresenting the width of it and the depth of it. I think the whole piece of property, as I understand it, was enclosed by a fence, but in the back corner there was another little rectangular piece 20 by 30 feet that did not belong to Goldberg. But the title examination showed that and the deed describing his property showed that; it described it by metes and bounds. In that case Mr. Goldberg, who was the seller, went——

The Court (interposing): I think your time is up.

I overrule your motion. I will let it go to the jury subject to my right to set it aside.

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70 **Gilbert S. Seek,**

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Direct Examination

By Mr. Hilland:

Q. Will you state your full name? A. Gilbert S. Seek.

Q. Where do you live? A. 6936 Eighth Street, Northwest.

Q. What business are you in? A. Real estate and builder.

Q. How long have you been a builder in Washington? A. About twenty-seven years.

Q. Did you build a house at 6507 Piney Branch Road, Northwest? A. Yes, sir.

Q. Did you have any part personally in the sale of that house? A. No, only to sign the contract.

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71 Q. Now, Mr. Seek, shortly after you executed this contract, did you have a conversation with either Mr. or Mrs. Harris at their house? A. Well, Mr. Harris. I met him out front one morning. He wanted me to have the poison oak cut off an old pine tree.

Q. What was the result of that conversation? A. I told him it wasn't mine; it didn't belong to me; that the pine tree—it was in the alley.

Q. What did he say? A. He said when he went out to cut his lawn he went out and he got poisoned. His wife called up quite a few times to chop it off, and I said I wouldn't have anything to do with it. It didn't belong to me.

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73 Q. Referring to Defendant's Exhibit No. 1, which is a plat of the walls on lots 62 and 63 and shows the southeast corner of the house right on the alley line, did you build a house that way? A. Exactly.

Q. Did that receive the approval of the Building Inspector's Office? A. It did.

Q. From the District Building? A. It did.

Q. At that time, after you had finished the completion of that house, did you put a fence around any part of it? A. I did.

Q. Who built that fence for you? A. Sampson, a colored man, and another man, a white man by the name of Aleck Moore.

By Mr. Cavanaugh:

Q. What is his name? A. A colored man by the name of Sampson and Aleck Moore. We call him Slim; Sampson is his right name.

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75 **Gilbert S. Seek,**

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Direct examination (resumed)

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Q. Mr. Seek, I hand you Defendant's Exhibit 2 and ask you to look at it and tell the Court and jury whether or not that picture or photograph correctly represents a front view of the plaintiffs' property as it is today. A. I would say it certainly is exactly just as it is today.

Q. Now, Mr. Seek, there is a dark, shaded part here in this picture, and then the concrete gets light. Can you tell the jury whether or not that concrete was in there at the time you completed the construction of this house?

76 A. This curb that goes in there was in there, and the sidewalk was laid up to this light line. This light line is the new alley. All this curb was in there.

Q. Was there a surveyor's stake in the sidewalk then to to show where the line was between the alley and your lot? A. Yes, in the alley there is still a copper in the sidewalk. As near as I can remember it, it is still there (indicating).

Q. Now, Mr. Seek, I hand you Defendant's Exhibit No. 3 and I ask you whether or not that photograph correctly represents the condition in the alley from the rear of the house as it is today? A. I would say it does.

Q. Now, Mr. Seek, this photograph—Can you gentlemen see it?—shows a fence commencing down here (indicating). Is that the plaintiffs' house there right next to the alley? A. Yes, sir.

Q. That shows a fence commencing here (indicating) and running toward that house. Will you tell the Court and jury when that fence was built? A. That fence was built at the same time, right straight through.

Q. How long a fence is that that you show in this photograph? A. Sixty-six feet, one-half inch.

Q. Is that one-half inch or foot? A. Foot.

Q. Sixty-six and one-half feet in length? A. Yes.

77 Q. Has that fence been changed from what it was like when you originally built it? A. I would swear that that fence was exactly where it is now where I built it.

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81 Q. Mr. Seek, one of these photographs shows a little piece of fence on the plaintiffs' property, on Defendant's Exhibit No. 4. Do you see that piece of fence that is there? A. Yes.

Q. That is the fence you built? A. I certainly did.

Q. Have you measured the length of that piece of fence? A. Yes.

Q. How long is that piece of fence? A. I measured it 13 feet 9 inches.

Q. Is that just as you constructed it originally? A. Exactly.

Q. Now, Mr. Seek, before that fence was built along the alley was that property surveyed? A. It certainly was.

Q. Were the surveyor's stakes along that alley at the time you had the fence built? A. Yes, sir, that is
82 what we built them by.

Q. That is what you built them by? A. That is what we built them by.

Q. Was that fence built within or without those surveyor's stakes; inside or outside of them? A. Inside.

Q. About how far inside? A. We always set those corner posts about an inch and a half inside the surveyor's peg. We make them leave them there so anybody can check from the same surveyor's peg.

Q. Did you ever tell anybody, either the plaintiffs, Mr. Partlow, or anybody else, that the pine tree that was in the front yard— A. (interopsing) I didn't.

Q. Was on the property? A. No.

Q. Did you ever make a claim it was on the property at any time? A. No.

Q. Was the pine tree on the property? A. No, sir, it wasn't.

Q. Could anyone looking at the property tell it wasn't on the property? A. Sure, they could tell. That tree was fully four feet in the alley.

Q. It was fully four feet in the alley? A. It was fully four feet in the alley. I know well where that tree was.

Q. Do you know when the District put that alley
83 in, the new alley? A. It was a good long time after these houses were finished.

Q. Did you have anything to with it whatever? A. Not one thing.

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85 **Louis L. Partlow**

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86 Direct Examination

By Mr. Hilland:

Q. Will you state your full name? A. Louis L. Partlow.

Q. Where do you live? A. 810 Aspen Street, Northwest.

Q. How long have you lived in Washington? A. Since about 1912.

Q. What business are you in at the present time? A. Real estate.

Q. What phase of the real estate business are you engaged in? A. Salesman.

Q. With what firm? A. Waple and James, Incorporated.

Q. How long have you been a real estate salesman in the District of Columbia? A. I went in it in the spring of 1924; I think it was around April.

Q. Have you specialized in any phase of the selling business? A. Selling houses.

Q. How long have you been with Waple and James? A. I first went with him, Waple and Lewis, in 1925. It was Waple and Lewis then, and I stayed with him until they separated.

Q. When was that? A. 1927 I think it was.

Q. And then? A. And then I was with the firm of
87 Lewis, and then I went back with Mr. Waples in 1936.

Q. You have been there since? A. Yes, sir.

Q. In August, 1938, were you covering the house 6507 Piney Branch Road, Northwest? A. Yes, sir.

Q. Do you know the plaintiffs in this case, Mr. and Mrs. Harris? A. I met them on the job.

Q. When did you first meet them? A. I met Mrs. Harris —it was either Wednesday or Thursday of the week that we made the sale on this house. On that week she had visited a Mrs. Thompson who lived next door. Mrs. Thompson brought her over to the house and introduced me to Mrs. Harris.

Q. Did you show her through the house? A. Yes.

Q. What occurred on that occasion? A. It was that night —it was possibly seven or eight o'clock, maybe eight-thirty —we usually close at nine—and she came through and looked at the property and said she liked it very much. She said: I want to get my husband out to see it.

It was dark on the outside; we didn't go on the outside I don't believe that night at all. We did go through the house from the basement to the attic.

Q. You didn't show her the lot at all? A. I don't recall showing the lot that night at all.

88 Q. When did you next see Mrs. Harris? A. The following Sunday. Mr. and Mrs. Harris drove out between two-thirty and three-thirty. Mrs. Harris introduced me to Mr. Harris. That was my first meeting with Mr. Harris.

Q. Did you show them through the house? A. I invited them in and showed them through the house. We went thoroughly through the house; it took possibly half an hour or more, and then we went out in the yard, in the back yard. I began to tell him about the lot, and he says: Let's forget the lot; if it is too big a lot I don't want it. I don't want to break my back cutting the grass.

Well, we walked down the yard, down to the garage, and I showed the entrance to the garage, and outside of the alley she, Mrs. Harris, I believe she questioned me on the alley, and I said: I don't know how long it will be that way. It was supposed to be paved.

Q. What was the condition of the alley? A. It was gravel and cinders; it wasn't a paved alley.

Q. Could you tell what the course and boundaries of the alley were? A. Not very well, no, sir.

Q. Did you have any conversation with Mr. and Mrs. Harris after you got outside? A. Oh, yes, we talked house, lots, and everything.

Q. Did you have any conversation about a pine tree? A. Mrs. Harris asked me about a pine tree out there. It was a very scrubby, old pine, and I said: What do you want with it? And she said: Just to have a tree on the lot. She says: Will it go with it?

89 I said: As far as I know, Mrs. Harris.

From the point of the alley where the entrance was cut in from the curb, the scrub pine was here (indicating). This lot curved around a foot or two and came back to the corner of the house, and I said: The way this alley is situated nobody in the world can tell where the line is; if they straighten it out, they will take the tree out, and if they don't straighten it, it will stay there.

Q. What other conversation did you have about the pine tree? A. I think that was the only conversation we had about the pine tree.

Q. Did you have any conversation about the pine tree at the home of Mr. and Mrs. Thompson? A. I don't recall; no, sir.

Q. When Mrs. Harris asked you whether or not the pine tree was on the lot, did you at any time say: Yes? A. I told her I didn't know; it didn't look like it was from the curve; if you run it straight, it is bound to be taken.

Q. When you say that it looked like it wasn't, will you explain to the jury from that photograph, referring to Plaintiffs' Exhibit 2, what you mean (handing photograph to witness)? A. I mean, the curve was cut in there at that time. There was a bend in their (indicating), and the tree was close to this bend, and with this bend in there, I could not tell. If the alley was coming straight in, it would take the tree, or a bulge would leave the tree in.

Q. Did Mr. Seek ever tell you that that tree was on

90 the lot? A. No, sir.

Q. Now, did you have occasion, or did Mr. and Mrs. Harris ask you any questions about the fence that was along the alley side of the back yard? A. No, sir.

Q. Did you make any representations about the fence at all? A. No, sir.

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92 Q. Have you seen Mr. and Mrs. Harris since you made this sale to them? A. Well, I haven't seen them from the time they settled for the property, bought the property. I was in touch with them the next day after the contract was ratified, and once I recall that when I was covering another house, Mrs. Harris and Mrs. Thompson came by about some handles on the stove to be changed.

Q. Did you ever see Mr. Harris at the office of Waple and James? A. I remember seeing him at the office, at our office. I guess it was last year, early last spring, he came down there.

Q. On these occasions when you saw Mr. and Mrs. Harris, did they ever accuse you of defrauding them in connection with this sale? A. Not a bit in the world.

93 Q. Did they accuse you of misrepresenting the location of the pine tree that was in the front yard? A. Not a bit.

Q. Did they accuse you of misrepresenting the location of the fence along the back yard? A. No, sir.

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100 **Joseph William Sampson**

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Direct examination

By Mr. Hilland:

Q. Will you please state your full name? A. Joseph William Sampson.

101 Q. Will you keep your voice up so the jurors can hear you?

Where do you live? A. 1915 Fourth Street.

Q. How long have you lived in Washington? A. About seven years.

Q. Do you know the defendant, Gilbert S. Seek, in this case? A. Yes, sir.

Q. How long have you known him? A. About seven years.

Q. How long have you been working for him? A. About —near seven.

Q. How many? A. Nearly seven years.

Q. What kind of work do you do for Mr. Seek? A. Carpenter.

Q. Did you ever build any fences for him? A. Yes, sir.

Q. Did you build a fence in the rear and on the side of 6507 Piney Branch Road, Northwest? A. Yes, sir, I did.

Q. Do you remember when you built that fence? A. In 1938; I don't know exactly the date.

Q. How many fences did you build at that time around that location? A. Three.

Q. How many? A. Three.

Q. I hand you Defendant's Exhibit No. 3 and ask
102 you whether or not the fence shown on that photograph is any part of the fence you built (handing photograph to witness)? A. (After examining the photograph last referred to) Yes, it is.

Q. Did you build all of the fence shown in that photograph? A. Yes, sir.

Q. Is that fence as shown in the photograph just exactly the same as it was when you built it? A. Yes, sir.

Q. Did you measure the length of the fence shown in the photograph? A. Yes, I did.

Q. How long was it? A. Sixty-six feet and a half.

Q. Sixty-six and a half feet? A. Yes, sir.

Q. That fence was not disturbed when the alley was put in there? A. No, sir, it wasn't.

Q. Now, I show you Defendant's Exhibit No. 4 and call your attention to that little strip of fence that is shown near the bottom of that photograph. I ask you whether or not that is part of the fenec you built? A. Yes, sir.

Q. Is that part of the 66½ feet about which you just testified? A. No, sir.

Q. How long is that little strip that is shown in that
103 picture? A. It is 35 feet.

Q. Just that strip? A. Yes, sir.

Q. That commences near the opening of the garage, beyond the east side, and runs away from the garage? A. Yes, 35 feet.

Q. That is 35 feet long? A. Yes, sir.

Q. How long is the opening in front of the garage? A. Twenty-five feet, six and a half inches.

Q. Did you make any notes when you made the measurements out there? A. Yes, I did.

Q. Do you have them? A. Yes, sir.

Q. Will you refer to those and refresh your recollection about that little strip of fence shown in Defendant's Exhibit No. 4? It comes to a point like this (indicating)? A. (Referring to paper writings) Yes, sir.

Q. Right at this point along the alley, there is a little piece of fence (indicating). How long is that little strip of fence? A. Thirteen feet, 9 inches.

Q. Thirteen feet, 9 inches? A. Yes, sir.

Q. That is just as you built it originally? A. Yes, sir.

Q. From the end of that fence up to the southeast
104 corner of the garage, how long is that opening up to the end of the garage? You can refer to your notes. A. Thirty-five feet, 8 inches.

Q. Thirty-five feet, 8 inches? A. Yes, sir.

Q. From the southeast corner of the garage, running toward the house and up to the southeast corner of the house, how long is that strip of fence? A. Nineteen feet, 5 inches.

Q. Haven't you got those figures mixed up? Isn't that strip from the southeast corner down to the garage 35 feet, 8 inches? A. Yes, sir.

Q. How long is that opening in front of the garage? A. Twenty-five feet, 6½ inches.

Q. The other strip from the garage is 35 feet, 8 inches? A. Yes, sir.

Q. Have you measured the distance between the inside of that telephone pole that is there and the fence? A. Yes, I did.

Q. What is that? A. Seven inches.

Q. Have you measured the distance from the corner post, right at the southeast corner of the garage there, to the southeast corner of the garage? A. Yes, sir, I did.

Q. What is that distance? A. Five and one-quarter inches.

Q. Now, referring to that same post, that is the one
105 at the southeast corner of the garage, where is that post located with respect to the post you put in at that place? A. The telephone pole?

Q. No.

Will you step down here a minute, please? Right here there is a post, isn't there (indicating)? A. Yes, sir.

Q. From that post over to this corner of the garage is how many inches? A. Five and one-quarter inches.

Q. Now, this post right here—You put a post right in there, didn't you? A. Yes.

Q. How far from the present post was the one you put in; do you remember? A. It was right at the corner of the garage.

Q. Right at the corner of the garage? A. Yes, sir.

Q. Do you remember how far that post was from the corner of the garage? A. It is my remembrance it was right on the corner of the garage.

Q. The post that ended up at the southeast corner of the house, how far was that post from the house? A. Right against the house.

Q. Was that fence straight when you built it, or did it have a bulge in it? A. It was straight.

Q. It was a straight fence? A. Yes, sir.

106 Q. Did you have any line by which you erected it? A. Yes, sir.

Q. What was the line by which you erected it? A. There is a surveyor's peg.

Q. About how far apart were the surveyor's pegs at the time you erected the fence? A. I guess about 35 feet.

Q. Thirty-five feet apart? A. Yes, sir.

Q. Where did you put the fence with respect to the surveyor's pegs? Did you put the fence on the alley side or inside? A. On the inside.

Q. About how far did you set it in? A. About an inch and a half from the surveyor's peg.

Q. For how many years prior to 1938 had you been building fences of this kind? A. I guess about three years.

Q. Did you always build them according to surveyor's pegs? A. Yes, sir.

* * * * * * * * * *

107 Q. Now, did you notice the pine true that was in front, near the front yard of that property? A. Yes, I did.

Q. Was that true on the lot or on the alley? A. In the alley.

Q. Standing on the sidewalk, was that entrance to the alley fixed like that at the time that the house was completed? A. Yes, sir, this much of it was.

Q. The entrance was fixed up? A. Yes, sir.

Q. Was there any surveyor's mark in the sidewalk or in the entrance to the alley? A. In the sidewalk.

Q. Will you point out about where it was? A. Just about along here (indicating).

Q. Is it still there? A. Yes, it is.

Q. When you stood there on the sidewalk, could you tell by looking at the pine true whether it was on or off the lot ? A. Yes, sir.

Q. What could you tell? Could you tell it was off the lot? A. Off the lot, yes, sir.

Q. Did you ever hear Mr. Seek have a conversation with either Mr. or Mrs. Harris about that pine tree? A. Yes, sir, I did.

Q. Where was that conversation? A. In the back yard near the garage.

Q. With whom did he have the conversation? A.

108 With Mr. — I can't think of his name.

Q. Mr. Harris. A. Yes, sir.

Q. What was the conversation you heard? A. He asked him about that poison ivy that was on the tree, and so he told him he didn't have anything to do with it, and he wanted him to cut it off, and he said he could not do anything with it. It was in the alley; the tree was in the alley.

* * * * * * * * * *

114 **Hugo A. Stahl.**

* * * * * * * * * *

Direct Examination

By Mr. Hilland:

Q. Will you state your full name? A. Hugo A. Stahl.

Q. Where are you employed? A. In the Surveyor's Office, District Surveyor's Office.

Q. How long have you been employed there? A. About twenty years.

115 Q. In 1938, did you make a survey of the alley line of the alley coming out of Piney Branch Road, Northwest, adjacent to lots 62 and 63 in square 2973? A. I made a survey of that lot. I don't see the date—1938.

Q. February 2, 1938.

Mr. Cavanaugh: We will concede it was made on March 2, 1938.

By Mr. Hilland:

Q. Did you make that survey personally? A. Yes, sir.

Q. Did you drive surveyor's stakes in when you made it? A. Yes, sir.

Q. Did you put any out in the sidewalk? Will you take that picture and show where you put the surveyor's peg in the sidewalk (handing photograph to witness)? A. I can't tell from the picture.

Q. Can you tell us approximately where you would have put it? A. We would put it in the sidewalk opposite the corner of the lot.

Q. What kind of plug is it that you put in the sidewalk? A. A copper plug.

Q. Does your plat show that you put one in the sidewalk there? A. Yes, sir.

Q. Where did you put your next stake? A. At the lot corner.

116 Q. Where was the next one? A. That one at the lot corner was a wooden stake.

Q. Where is that nearest? A. At the intersection of the alley, at the angle of the alley.

Q. At 11.8 feet? A. 11.16 from the building line.

Q. Another stake? A. Yes, sir.

Q. Where was the next one? A. Over there east on the alley, 107.53 east of the angle.

Q. That is the extreme back point of the alley? A. Extreme easterly corner of it.

Q. What kind of pegs are they? A. A wooden oak peg.

Q. Did you continue to put in these pegs all down the alley? A. Yes, sir. The alley was marked.

* * * * * * * * * *

Thomas R. Imlay

* * * * * * * * * *

117 Direct Examination

By Mr. Hilland:

Q. Will you state your full name? A. Thomas R. Imlay.

Q. Where are you employed? A. Waple and James' real estate office.

Q. How long have you been employed there? A. Since August, 1937.

Q. Were you employed there in September, 1938? A. I was.

Q. Did you have occasion at that time to handle the settlement of the sale of property at 6507 Piney Branch Road, Northwest? A. I did.

Q. At whose request did you prepare the deed? A. At the request of the purchaser.

Q. Did you order an examination or search of title too? A. I did order an examination of the title.

Q. At whose request did you order that? A. At the request of the purchaser.

Q. Mr. and Mrs. Harris? A. Yes, sir.

Mr. Hilland: May I have that deed and title report, Mr. Cavanaugh?

(Thereupon Mr. Cavanaugh handed paper writing to Mr. Hilland.)

Mr. Hilland: I offer this deed in evidence.

(Thereupon the document referred to was received in evidence and marked as "Defendant's Exhibit No. 5.")

118 Mr. Hilland: I offer this continuation of title in evidence.

(Thereupon the document referred to was received in evidence and marked as "Defendant's Exhibit No. 6.")

Mr. Hilland: I would like to call the Court's and the jury's attention to the description on the second page of the continuation of title, right here (indicating), and the description in the deed too.

The Court: Suppose you read it.

(Thereupon Mr. Hilland read a description of lots No. 62 and 63, in square 2973, from Defendant's Exhibit No. 6.)

Mr. Hilland: May I have the settlement sheet?

I offer this settlement sheet in evidence.

(Thereupon the document referred to was received in evidence and marked as "Defendant's Exhibit No. 7.")

By Mr. Hilland:

Q. Mr. Imlay, did Mr. and Mrs. Harris pay for the preparation of the deed? A. They did.

Q. Did they pay for the examination or search of title? A. Yes, sir.

Q. For the continuation of title report that was issued? A. They did.

Q. Does this settlement sheet of September 21, 1938, represent the correct date of settlement? A. It does.

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BRIEF AND APPENDIX FOR APPELLEES

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8150

GILBERT S. SEEK, *Appellant*,

v.

THOMAS B. HARRIS, ET AL., *Appellees*.

FRANCIS L. NEUBECK,
JOHN F. O'CONNELL,
JOSEPH I. CAVANAUGH,
Attorneys for Appellees.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8150.

GILBERT S. SEEK, *Appellant,*

v.

THOMAS B. HARRIS, ET AL., *Appellees.*

BRIEF FOR APPELLEES.

COUNTER-STATEMENT OF CASE.

The property sold by appellant to appellees by the contract of August 29, 1938, (Record, p. 139) was not rectangular in shape. As shown by the District of Columbia Surveyor's plat (Appellee's App. 4), it was triangular with the exception of the southwest angle, which angle was cut off by a turn in the adjoining alley at a point 11.68 feet from the front line of the lot. The southern boundary, which adjoins the alley, and along which the ground in dispute lay, is not a straight line. For this reason, the true southern boundary of the lot could not have been ascertained by lining up any two points with the eye, or by a casual reading of the description contained in the title examination or deed.

The contract of sale did not describe the property either by metes or bounds or by lot and square number, but merely by street address (Record, p. 139).

The house was built by appellant with its front wall parallel to Piney Branch Road and with its southeast corner on the true south line. Before the property was displayed to appellees, however, appellant had caused to be erected a wire fence strung upon wooden posts and runners from a point opposite said southeast corner of the house along the apparent south lot line to the west side of the garage in the rear, for a total of approximately 35 feet (Appellants' App. 15). It was this fence which the District of Columbia subsequently found to be upon the property dedicated to alley use. The south boundary of the lot extended due west from the southeast corner of the house to a point 11.68 feet from the front lot line, at which point it veered toward the northwest, proceeding in another straight line until it intersected the front line of the lot at a right angle to the street (Record, p. 153, Appellee's App. 4). At the front of the house, the south side of the lot was unfenced (Record, p. 143). The front lawn was graded and sodded and extended a distance of from two to more than four feet beyond the true lot line and into the alley property (Appellant's App. pp. 23, 24, 34). The alley was then unpaved (Appellant's App. pp. 12, 35). A tree, whose trunk had grown to a diameter of eight to ten inches (Appellant's App. p. 24), was standing near the southwest angle of the lot, about three or four feet from the front (Appellant's App. p. 12). Actually this tree was in the alley at least four feet outside the true boundary (Appellant's App. p. 34).

Before the house was offered to appellees, appellant had had a concrete walk laid from the porch steps at the rear of the house, along the rear wall of the house, to the alley. A gate was set in the fence where the walk intersected it (Appellees' App. p. 1). This walk was found by the District of Columbia officials to be encroaching upon the alley to a depth of fourteen inches when the city surveyed the alley preparatory to paving (Appellant's App. p. 17, Tr. pp. 30, 31).

Before paving the alley, in the Summer of 1939, the city, or its paving contractor, took up the thirty-five foot stretch

of backyard fence, cut off the end of the concrete walk (Record p. 149), cut into and graded down a strip along the southern side of the front lawn, from the corner of the house to the front street, and removed the tree standing near the southwest angle of the lot (Appellant's App. pp. 23, 24).

After the paving was completed, the corner of the house, which had appeared from the fence erected by the appellant to stand about fourteen inches from the south edge of the lot (Appellant's App. p. 11), was actually found to be exactly on the lot line and abutting the alley (Record p. 142).

On February 2, 1938, the District of Columbia Surveyor had surveyed the lot at the order of appellant's architects (Appellees' App. p. 2), and placed pegs indicating the boundaries of the lot. On April 8, 1938, after the foundation of the house was started, the District Surveyor made an examination known as a wall check (Appellees' App. p. 2 & 3), which indicated that the southeast corner of the house was exactly on the southern boundary of the lot. Following the survey and wall check, and when the house was completed, appellant directed his employees to lay the sidewalk, erect the fence (Appellant's App. p. 32) and grade and sod the front lawn (Record p. 143), all of which were done in the manner found by appellees when they inspected the house and lot in the company of the real estate salesman.

While there is some conflict on the point, there was considerable positive evidence given the jury that this salesman, when asked by appellees whether the tree was upon the lot offered for sale, made positive assertions that it was (Appellant's App. pp. 15, 20, 27, 31 and 34).

SUMMARY OF ARGUMENT.

Appellees were entitled, as reasonably prudent persons, to rely upon the representations of the appellant, made when he caused the fence, sod and concrete walk to be placed beyond the line of his property, and these false representations remove the case from the application of *caveat emptor*. There was only one way in which appellees could have discovered the falsity of appellant's representations, and that would have been by securing their own survey of the property. It has not been customary in the District of Columbia for purchasers to obtain surveys in ordinary transactions such as this apparently was. *Battelle* v. *Cushing*, 21 D. C. Reports 59.

The law of *Shappirio* v. *Goldberg*, 20 App. D. C. 185, 192 U. S. 232 does not apply to this case, inasmuch as the vendor herein performed certain acts in landscaping and fencing the property and projecting the concrete walk which were calculated to deceive prospective purchasers and did deceive appellees. Due to the irregular shape of the lot, appellees could not have discovered appellant's deception by reading the description in the deed or from the recorded plat.

ARGUMENT.

The Acts of Appellant in Causing or Allowing His Workmen to Erect the Fence, Extend the Concrete Walk, and Sod and Grade the Front Lawn, All Beyond the True Boundary of the Lot, Which He Well Knew From a Survey, and Thereafter Allowing It To Be Offered for Sale to Appellees in Such Condition and Without Warning Constitutes Actionable Fraud or Misrepresentation.

Although there is some conflict on the point, there was substantial evidence that the representations of the salesman to appellees that the tree on the front corner of the sodded lawn was within the property offered for sale (and inferentially that the true line of the property lay beyond

the tree) was a positive statement of fact and not an expression of opinion. It is true that one of the appellees testified that he thinks the salesman was not deliberately falsifying but was deceived by the fence, walk and sod, as were appellees. Nevertheless, he did state as a fact that which he did not know to be true.

Without conceding that the salesman's statements were merely given as opinion, the acts of appellant, even in the absence of any verbal representation, created a deceptive appearance as to the true boundary and dimensions of the lot, which in and of themselves constituted false representation. For it was entirely reasonable and prudent for any prospective purchaser to assume that the builder and owner had placed his fence and walk on his own property and had sodded and graded the lawn only as far as he owned. Appellees were entitled to rely upon this representation as long as the salesman or appellant did not inform them that the tree was not on the property, that the true boundary was inside the sodded area and that part of the fence and walk did not belong to the property he was offering for sale.

However, the salesman did not remain silent on the question. When he was asked as to ownership of the tree, he added to the misrepresentation already committed by appellant by assuring appellees that the tree was upon the lot.

While appellant testified that he directed his workmen to put the fence on the true line as indicated by the surveyor's pegs, and a workman testified that he put the fence within the pegs, an assistant engineer of the District of Columbia Highway Department who was in charge of subsequently paving the adjoining alley, testified positively that the fence and walk did encroach upon the alley, and the tree was not on appellees' lot. The jury, as shown by their verdict, decided to believe the disinterested official on this point. Appellant admitted in his testimony that the tree was as much as four feet off the lot (Appellant's App.

p. 34) and other evidence shows visually that sod was laid around and beyond that tree (Record p. 143). Likewise, there was no contradiction of the testimony of appellee, Thomas B. Harris, that appellant or his employees had extended the concrete walk across the lot line and over into the alley, and this assertion is supported by a photograph in evidence (Record p. 149).

The evidence established definitely that appellant had a survey to guide him when he built his house, and a later check by the city authorities during the course of construction showed one corner of his foundation to be exactly on the lot line in question. With this information and guidance, appellant either directed or permitted his employees to create the illusion of the larger lot, upon which deception appellees relied and acted to their detriment. And from the evidence showing the position of the house on the lot, the limited area of the lot, and the obvious enhancement in value which the apparent additional ground gave the property, the jury may well and correctly have inferred that the deception was deliberate on appellant's part and not a mistake of his employees.

But in either instance, appellant was certainly responsible for the situation which deceived the appellees.

A false or fraudulent representation need not be a verbal one, in order to be actionable. There is no distinction in law between misrepresentation effected by words and misrepresentation effected by other acts. *Bigelow on Fraud*, page 467.

Appellant is chargeable, first, with causing or permitting the deceptive situation to exist when the property was offered for sale to appellees, and, secondly, for not instructing the salesman to advise prospective purchasers where the true lot line lay.

Only by a Survey Could the Appellees Have Discovered the Falsity of Appellant's Representations, and This Is Not Within the Requirements of Reasonably Prudent Conduct in These Circumstances.

Unlike the purchaser involved in *Shappirio* v. *Goldberg,* 20 App. D. C. 185, 192 U. S. 232, appellees could not, by a "casual reading of the description in the deed or examination of the recorded plat", have determined where the true lot line lay. This information could have been ascertained by appellees in only one way, by a survey, which would have placed new pegs for appellees' observation, similar to those appellant had to guide him. For the alley was unpaved at the time of the sale and its northern edge was indefinite and undeterminable. Also, the lot line which adjoined it was not straight, but had an angle in it 11.68 feet from the front of the lot.

To hold in this case other than the trial court and jury have decided would be to establish the universal requirement in the District of Columbia of a survey before any real property purchase can be safely consummated. Such is not the practice, and it should not be made so. That it was not within the requirements of reasonably prudent conduct in this case was established in *Battelle* v. *Cushing,* 21 D. C. Reports (General Term) 59. In reversing the action of the trial court, which dismissed an action based upon false representation of land offered for sale, the predecessor of this tribunal observed (page 72):

> "In this case it is contended, as the complainant had the opportunity to take the plat, go to a surveyor before purchasing, and find out exactly the location of the land and thus secure herself against the imposition from Dennison's statements, the court should not interfere. This objection is answered in Bigelow on Fraud, 523, 528, in these words: 'The proposition has now become very widely accepted at law, as well as in equity, that a man may act upon a positive representation of fact, notwithstanding the fact that the means of knowledge were specially open to him, although he had legal notice as e. g., in the public registry, of the real state of things. * * *' "

Since the Appellant Made False Representations to Appellees, the Doctrine of Caveat Emptor Does Not Apply.

There was no obligation upon the appellees to question or doubt the physical representations of appellant as to the apparent boundary, or the bolstering assertions of the salesman, his agent. In *Kell* v. *Trenchard,* 142 Fed. 16 (appeal dismissed *per curiam,* 202 U. S. 613) the Court dealt with the effect of fraudulent representations upon the doctrine of *caveat emptor,* in the following (page 21):

> "The appellant, however, insists that the rule of caveat emptor applies, that full opportunity was afforded appellees to ascertain the quantity of the timber upon the premises, and that they availed themselves of such opportunity and acted upon the information thus received and not upon the representations of appellant, either personally given, or contained in the option, and they should be bound thereby. Suffice to say the doctrine of caveat emptor does not apply in cases of actual fraud. 1 Bigelow on Fraud, 528; Hill v. Brower, 76 N. C. 125; Barnard v. Kellogg, 10 Wall. 383, 388, 19 L. Ed. 987; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 112, 3 Sup. Ct. 537, 28 L. Ed. 86."

This is stated even more positively by a West Virginia court in deciding a case similar to the instant one:

> "No doubt the defendants could have had a survey made of the land and determined that the boundaries did not include the tract of timber which it was afterward found lay without the same, but were they under obligation to do this? When one is dealing with another in regard to his property, he may rely upon the representations of that other, notwithstanding by independent investigation he could have discovered that the representations were false. There is no presumption of law that the representations made by parties dealing with each other in business transactions are false so as to require independent investigation to confirm them. Rather it is the rule that the party to whom the representation is made may believe the same to be true and act thereon, unless he has independent knowl-

edge of its falsity. People having business transactions must understand that when they make statements or representations which induce others to deal with them they must answer for the truth thereof. Staker v. Reese, 82 W. Va. 764."

Stout v. *Martin*, 87 W. Va. 1, 104 S. E. 157 (1920).

Shappirio v. Goldberg Not Controlling Here.

Appellant has relied principally upon the case of *Shappirio* v. *Goldberg, supra.* While that case arose out of a sale of real estate in which the purchaser was deceived as to the land actually transferred to him, it should be noted that both this Court and the Supreme Court based their denial of relief on three points:

(1) The seller, Goldberg, had performed no affirmative act nor made any false statement, upon which the purchaser relied, but had merely maintained silence regarding his occupancy of the building at the rear, while the purchaser assumed that the building was included in the sale and did not ask.

(2) A casual reading of the description of the property in the deed or examination of the recorded plat by the purchaser would have disclosed to him that the rectangle upon which the rear building stood was not included; and

(3) The seller's action was to rescind the sale or reform the contract, both of which forms of relief were inconsistent with his retention of the property for a considerable time after his discovery of his mistake. In this connection, the Supreme Court pointed out (page 242):

"It is well settled by repeated decisions of this court that where a party desires to rescind upon the ground of misrepresentation or fraud, he must upon the discovery of the fraud announce his purpose and adhere to it. If he continues to treat the property as his own the right of rescission is gone, and the party will be held bound by the contract. Grymes v. Sanders, 93 U. S. 55; McLean v. Clapp, 141 U. S. 429. In other

> words, when a party discovers that he has been deceived in a transaction of this character he may resort to an action at law to recover damages or he may have the transaction in which he has been wronged set aside by the rescission of the contract. If he choose the latter remedy, he must act promptly, 'announce his purpose and adhere to it', and not by acts of ownership continue to assert right and title over the property as though it belonged to him. * * * This conduct (Shappirio's) is wholly inconsistent with an election to undo the transaction and stand upon his right to rescind the contract."

The instant case differs from the *Shappirio* case upon all three of the controlling points:

(1) Appellant made positive misrepresentations of fact, when he caused the sod, fence and walk to be placed as they were when appellees first saw the property, and his agent, the real estate salesman, confirmed, or at the very least, bolstered these false representations. Appellees believed these representations and acted upon them to their loss.

(2) Due to the irregular contour of the lot, it was impossible for appellees to discover by a reading of the description of the land that the boundary was not where appellant represented it to be. For the same reason, examination of the surveyor's plat would not have revealed the deception, since the lot was anything but rectangular.

(3) This is an action for damages, and not for equitable relief, which might have been inconsistent with appellees' retention of the property, under the *Shappirio* decision.

In addition to the local case of *Battelle* v. *Cushing, supra,* there are numerous decisions in other jurisdictions, upon identical or nearly similar facts, which support the rulings of the District Court herein:

Kell v. *Trenchard, supra.*
Yarnell v. *Knickerbocker Co.,* 120 Wash. 205, 206 Pac. 936.
Stout v. *Martin, supra.*

Starwich v. *Ernst*, 100 Wash. 198, 170 Pa. 584.
33 American Law Reports, 1060

and in *Lou* v. *Bethany Lutheran Church*, 168 Wash. 595, 13 P. (2) 20, the court stated (page 598):

> "It has become the settled law of this state that, when a vendor undertakes to point out lands or boundaries to a purchaser, he must do so correctly. *He has no right to make a mistake*, except under the penalty of having the contract rescinded or responding in damages. The fraud of the vendor in such a case consists in representing as true, with knowledge that it is being relied upon as true, that which he did not know to be true. (Cases cited.)" (Italics supplied.)

Respectfully submitted,

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Attorneys for Appellees.

APPENDIX

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8150.

GILBERT S. SEEK, *Appellant,*

v.

THOMAS B. HARRIS, ET AL.,*Appellees.*

APPENDIX TO BRIEF FOR APPELLEES.

EXCERPTS FROM TESTIMONY AND RECORD.

Pearl Harris Direct Examination

34 Q. Did you pay any particular attention to the side of the house back where the sidewalk was? A. Oh, yes, oh, yes.

Q. You looked around the house? A. Oh, yes.

Q. From the way the fence was constructed and the way the walk was laid, how did it appear that the corner of the house sat with reference to the edge of the lot? A. Well, it never occurred to me that the house was anything except right. The post that the hinge was fixed on for the gate was fastened just to the side—well, this is the corner (indicating) at the back, and the post was fastened right there,

and the hinge on the gate had been here, and the walk extended out to the gate.

* * * * * * * * * *

Marion W. Chinn Direct Examination.

43 Q. Now, will you examine your notes and tell the Court and jury when the last survey was made of lots 62, 63, and 64 by the District of Columbia? A. The last survey was made on March 5, 1938—I mean,—no, February 2, 1938, it was made, and mailed out on March 5.

Q. For whom was that made, sir? A. It was made by Mr. Hugo A.—

Q. (interposing) For whom, I mean. A. For Dillon & Abel.

Q. Who are they? A. That was the firm of architects or designers of homes.

Mr. Hilland: We will concede that it was made for Mr. Seek. They were his architects.

The Court: What is that?

Mr. Hilland: They were Mr. Seek's architects. We will concede it was made for him.

44 By Mr. Cavanaugh:

Q. Will you compare this with your notes and see if it is a true copy (handing a photostat to the witness)—

Mr. Hilland (interposing): I will concede it is a true copy.

Mr. Cavanaugh: I would like to offer this in evidence.

(Thereupon the photostat in question was received in evidence as Plaintiffs' Exhibit No. 7.)

Mr. Cavanaugh: This is a corner check. I would like to offer that in evidence.

Mr. Hilland: We concede that the back corner of the house comes right on the line.

(Thereupon the photostat in question was received in evidence as Plaintiffs' Exhibit No. 8.)

By Mr. Cavanaugh:

Q. After the survey, Mr. Chinn, can you tell from your notes there whether a wall check was made? A. There was.

Q. What was the date of that? A. The date of the wall check was April 8, 1938.

Q. That is set forth by the second photostat I got the other day? A. Yes.

Q. Mr. Chinn, in that survey how were the lot dimensions marked off? A. May I refer to that plat, please?

Q. Refer to the original.

Mr. Hilland: You mean you want to prove there were stakes?

45 Mr. Cavanaugh: That there were pegs driven.

Mr. Hilland: We concede that. I told the jury that.

The Witness: The south line of the lot was outlined by pegs at each of the corners.

* * * * * * * * * *

H.A.S.
4/6/38

Form 907–E. D.

Surveyor's Office
DISTRICT OF COLUMBIA

Washington, D. C., FEB 25-TH, *1938*

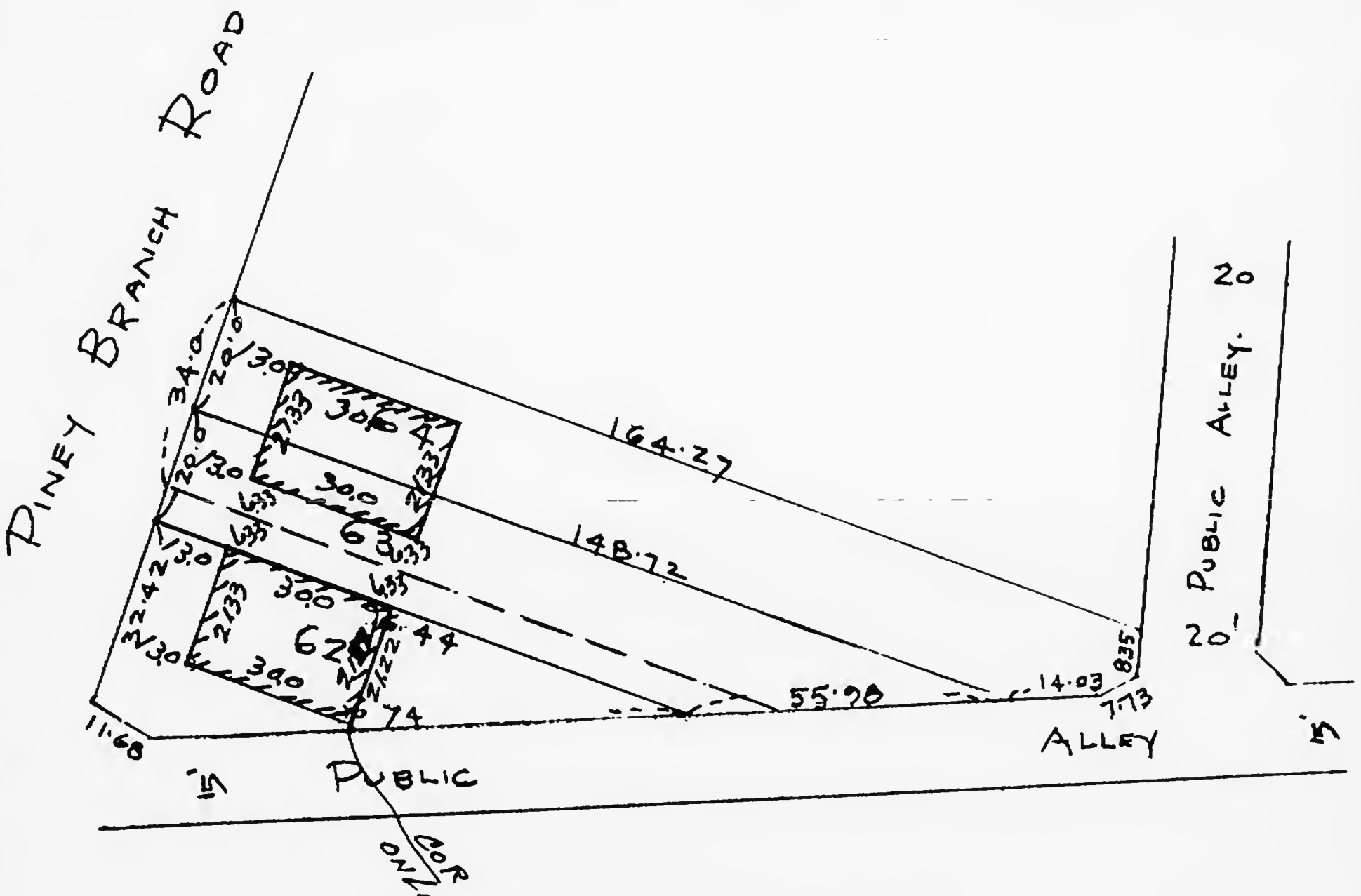
Plat, *for Building Permit of* LOTS 62-63+64-SQ 2973

Recorded in Book 57 *page* 32

Scale: 1 inch = 30 *feet*

S. O. 18503

NOTE: DATA SHOWN ON ASSESSMENT AND TAXATION LOTS OR PARCELS ARE PER RECORDS OF ASSESSOR, D. C. BUT DO NOT NECESSARILY AGREE WITH DEED DESCRIPTION.



NOTE ORDERED SURVEY OF LOTS 62 TO 64 AS PER DOTTED LINE - (2-PTS)

R.M.B

"The owner or applicant shall show upon such plat or survey, drawn to same scale as the plat or survey, all buildings or additions, located and to be located thereon, and the buildings or additions must be located and erected as shown on said plat or survey."—Building Regulations, Section 2, Part 1, Paragraph B–11, Building Regulations. Issued in accordance with Section 2, Part 1, Par. B–11.

Furnished to DILLON & ABEL

We/I hereby certify that ~~Patrick Lucas~~ Cardie Block *is/are the owner of all the land outlined in color on this plat; that all existing improvements are shown thereon and are correctly platted; that all proposed buildings or construction, or parts thereof, including covered porches, are correctly shown and agree with plans accompanying this application; that the foundation plan as shown hereon is drawn accurately to the same scale as the property lines shown on this plat; and that by reason of the proposed improvements to be erected as shown hereon the size of any lot or premises is not decreased to an area less than is required by zoning regulations for light and ventilation.*

(Signature of owner)

Completed

Edward A. Dent
Surveyor, District of Columbia.

Per R.M.B

9—1937

4

APPENDIX.

APPENDIX CASE
NO. 8152

APPENDIX TO BRIEF FOR APPELLANT.

(Filed January 20, 1942.)

IN THE

1 DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA.

HOLDING A BANKRUPT COURT.

In the Matter of JOHN THEODORE KIDWELL, trading as Kidwell Auto Body Company, *Bankrupt.*	Bankruptcy No. 4097.

RECORD ON APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

Agreed Statement.

This case was tried before the Referee in Bankruptcy on a petition of Lillian L. Moses, for discharge of her landlord's lien from the net proceeds of sales of certain personal chattels of the bankrupt, subject to execution for debt, held by Colman Brez Stein, Trustee in Bankruptcy, in the above entitled cause, which had been on the hereinafter described rented premises, at the time of the institution of proceedings by said Lillian L. Moses, plaintiff landlord against John T. Kidwell, herein known as John Theodore Kidwell, trading as Kidwell Auto Body Company, for the enforce-

ment of her said lien, under provisions of Section 1230 of the Code of Law for the District of Columbia, given her by Section 1229 of said Code, on the personal chattels of said Kidwell, her tenant, on the rented premises.

The Referee ruled that the lien given by said Section 1229, of the Code of Law for the District of Columbia on the chattels of said Kidwell, was unaffected by the subsequent bankruptcy of said Kidwell; but was lost by the removal of said chattels by said Kidwell from the rented premises, between the time of the institution of the
2 proceedings to enforce the lien and the judgment of the Municipal Court against said Kidwell for arrears of rent due by said Kidwell to said Lillian L. Moses, in the sum of $793.74 and costs and interest from April 14, 1941.

Said Lilliam L. Moses petitioned for Review of Referee's Ruling by Justice and the said review was denied by Justice Pine, and the Ruling of said Referee affirmed. From an Order, signed by Justice Pine, denying a review of the ruling of the Referee and affirming the ruling of the Referee, the said Lillian L. Moses appeals to the United States Court of Appeals for the District of Columbia.

On March 23, 1941, and for a continuous period long prior thereto, John T. Kidwell was a tenant of Lillian L. Moses of the premises known as, Garage in rear of No. 1120 or 1140 or 1144-18th St., N. W., in the City of Washington, District of Columbia, being lot numbered Seventy-two (72) of a subdivision in Square numbered One Hundred, Forty (140), as per plat of said subdivision recorded in liber No. 26 at folio 129, of the Records of the Office of the Surveyor of the District of Columbia.

On March 23, 1941, said Lillian L. Moses, as plaintiff, filed in the Municipal Court of the District of Columbia a Complaint naming John T. Kidwell, defendant, to wit, No. L. & T. 906,146, containing a count for possession of said premises, alleging that said John T. Kidwell, was a tenant by sufferance of the plaintiff; that his tenancy had been determined by the service of a due notice to quit of thirty days, and further, a count for judgment for rent due in arrears to March 22, 1941 in the sum of Seven Hundred Ninety-three and 74/100 Dollars ($793.74).

On April 8, 1941, there was a trial in the said Municipal Court of said Complaint, at which the defendant and his counsel appeared. At said trial, the undisputed evidence was that the rent agreed upon to be paid by the tenant, said Kidwell, was at the rate of $250, per month; that said
3 Kidwell was still in possession of the rented premises; that his tenancy was as described in the Complaint; that the thirty-days notice was duly served upon him and that the said thirty days had expired and that the amount of rent due by him to the plaintiff was correctly stated in the Complaint. There was a finding by the Court for the plaintiff against the defendant for possession of said premises and for $793.74, by consent. On said March 23, 1941, and for more than four months prior thereto and until April 14, 1941, certain personal chattels of the defendant, subject to execution for debt, were on said premises.

On April 14, 1941,—by Judge Cayton of the said Municipal Court a judgment was entered on finding for plaintiff for possession of said premises and for $793.74 by consent and interest from April 14, 1941 and costs.

On April 18, 1941, a Soldiers' and Sailors' Affidavit was filed in court and a *fieri facias* issued.

On April 19, 1941, prior to final termination of the aforementioned action for rent, said personal chattels of said defendant were found and levied upon at 1105-21st St., N. W., Washington, D. C., by the United States Marshal for the District of Columbia.

On April 21, 1941—An attachment was issued directed to the Lincoln National Bank, 318-7th St., N. W., and on April 24, 1941 the attachment last mentioned was answered, showing funds on hand to the credit of the defendant in the sum of $61.09.

On April 28, 1941, defendant, by new counsel, filed a motion in the said Municipal Court to set aside and vacate judgment—set to be heard May 5, 1941 and on the same date a Motion to Quash Attachment levied on personal property at 1105-21st Street, N. W., aforesaid and at Lincoln National Bank, aforesaid.

4 On April 28, 1941 there was issued by Judge Cayton, aforesaid, an Order staying further proceedings by the United States Marshal.

On May 1, 1941 the case was continued to May 5, 1941.

On May 12, 1941. Defendant's Motion to Vacate and Set Aside Judgment and Quash Attachment herein was Ordered Overruled.

Whereupon, the United States Marshal, aforesaid, was about to advertise and sell at public auction, the chattels belonging to the said Kidwell, which the Marshal had found and seized under the said *fieri facias* at said premises No. 1105-21st Street, N. W., to which new location the identical

chattels, aforesaid had been removed by said Kidwell, from the rented premises, after the commencement of action for rent and prior to judgment entered, when the said John T. Kidwell, under the name John Theodore Kidwell, to wit, on the 15th day of May, 1941, filed a petition in voluntary bankruptcy in the United States District Court for the District of Columbia, holding a bankruptcy court, case No. 4097—Bankruptcy and was on the 16th day of May, 1941, adjudged a bankrupt, and under an Order of the Referee in Bankruptcy the said Marshal refrained from selling the seized chattels, aforesaid and delivered them over to the duly appointed Receiver in said last mentioned cause, Colman Brez Stein, under a stipulation preserving the rights of the landlord plaintiff, in said suit in the Municipal Court, aforesaid.

On the 26th of May, 1941, said Colman Brez Stein, was duly appointed Trustee in Bankruptcy in this cause and thereafter, on giving an approved bond, sold at public auction, among other chattels of said Kidwell, the said chattels seized by the Marshal aforesaid, in execution of said *fieri facias,* aforesaid.

5 And the said Trustee in Bankruptcy holds the sum of Six Hundred, Seventy-one and 67/100 Dollars ($671.67), received from the sales of the chattels seized as aforesaid, subject to the Order of the Court, the net amount of which less expenses of sale of seized chattels is $534.84.

On July 8, 1941, said Lillian L. Moses filed with the Referee in Bankruptcy a petition requesting a discharge of her landlord's lien, given her by Section 1229 of the Code of Law for the District of Columbia, from funds in the hands of said Colman Brez Stein, Trustee in Bankruptcy,

aforesaid. And on the 25th day of September, 1941, by Order (signed) Fred J. Eden, Referee in Bankruptcy, the said petition was denied. (Appellant's App. 8.)

On October 2, 1941, said Lillian L. Moses filed in said last named cause, a petition for Review of Referee's Ruling by Justice, and on November 24, 1941, an Order was signed by Justice Pine, denying the motion to review ruling of the Referee and affirming the Order, at which time objection to the action of the Court was made. (Appellant's App. 8.)

Stipulation.

It is agreed, that the Order dated November 24, 1941, signed herein was signed by Justice Pine, over the objection of counsel for Lillian L. Moses, and that she shall have all the benefit of said objection, as if a formal objection and exception in open court were made at the time of said ruling.

The foregoing statement of evidence is all that is necessary for this appeal.

Points to be Relied Upon by Appellant.

1.—The landlord's lien given by Section 1229 of the Code of Law for the District of Columbia is a statutory lien or security and attaches to the tenant's
6 personal chattels, on the rented premises, as are subject to execution for debt, commencing with the ten-

ancy and continuing to attach for a specified time named in the statute creating the lien and the said time specified can not be shortened by the removal by the tenant of his personal chattels from the rented premises, if the identity of the goods is not lost.

2.—The words "on the premises" used in Section 1229, aforesaid, identifies the chattels to which the lien attaches and do not mean "while on the premises" and so long as the original identity of the chattels can be proved, the lien thereon is not lost, by the mere removal of the said chattels to a new location, within the District of Columbia, at least.

3.—The landlord has his choice of any of the three ways specified in Section 1230 of the said Code, for enforcing his landlord's lien, that may be applicable to the circumstances of the existing situation in a case.

4.—Attachment, judgment and execution are each legal proceedings directed by said Section 1230 of said Code, for the enforcement of a landlord's lien; but when used as directed in said Section 1230 of said Code, do not create a landlord's lien, but are the means directed by law for the enforcement of a previously created and existing lien.

5.—The landlord's lien given by said Section 1229, is not one obtained through "legal proceedings", within the meaning of the anti-preference provisions of the Bankruptcy Act of June 22, 1938, effective from and after September 22, 1938, and is not affected by the subsequent bankruptcy of the tenant.

Order.

Upon consideration of the Petition of Lillian L. Moses filed herein on the 8th day of July, 1941, requesting a discharge of her lien from certain funds in the hands of Colman Brez Stein, Trustee in Bankruptcy, and the Answer thereto filed herein by the said Trustee, it is, by the Court, this 25th day of September, 1941,

ORDERED, that the said Petition for discharge of lien be, and the same hereby is, denied.

(Signed) FRED J. EDEN,
Referee in Bankruptcy.

OK as to form
Appeal will be filed.
(signed) Gerald M. Johnson.

Order Appealed From.

ORDER.

Upon consideration of the motion filed herein to review ruling of the Referee and oral argument had thereon, it is, by the Court, this 24th day of November, 1941,

ORDERED, that said motion be and the same is hereby denied, and the ruling of the Referee referred to therein be, and the same is hereby affirmed.

BY THE COURT:
DAVID A. PINE,
Justice.

Objection to action of Court, because contrary to the law and facts in the case. Notice of appeal will be duly filed. No objection as to form.

Gerald M. Johnson,
Attorney for Lillian L. Moses.

8 **Notice of Appeal.**

To:
Colman Brez Stein,
Trustee in Bankruptcy,
Shoreham Building,
Washington, D. C.

Notice is hereby given and filed this 19th day of December, 1941, that Lillian L. Moses, hereby appeals to the United States Court of Appeals for the District of Columbia from the Order of this Court entered on the 24th day of November, 1941, in favor of Colman Brez Stein, Trustee in Bankruptcy against said Lillian L. Moses.

GERALD M. JOHNSON,
Attorney for Lillian L. Moses.

It is hereby agreed that the above contains all the evidence and record and proceedings considered necessary by the parties for the purpose of this appeal.

GERALD M. JOHNSON,
Attorney for Appellant,
1427-I Street, N. W.,
Washington, D. C.

Colman Brez Stein,
Attorney for Appellee,
Shoreham Building,
Washington, D. C.

Approved:
David A. Pine,
Justice.